UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

SHAW'S SUPERMARKETS, INC. d/b/a SHAW'S SUPERMARKETS AND STAR MARKETS	Cases 1-CA-39256 1-CA-39558
and	1-CA-39568 1-CA-39999
UNITED FOOD AND COMMERCIAL WORKERS INTERNATIONAL UNION, AFL-CIO, CLC	
and	1-CA-41201
LOCAL 791, UNITED FOOD AND COMMERCIAL WORKERS UNION, AFL-CIO	
and	1-CA-41154
INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 103	

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DECISION

Statement of the Case

WALLACE H. NATIONS, Administrative Law Judge: This case was tried in Boston, Massachusetts on September 29 and 30, 2003; October 1, 2, 3, 28, 29, 30 and 31, 2003; February 2, 3 and 4, 2004; and June 22, 2004. Based upon a charge filed by United Food and Commercial Workers International Union, AFL-CIO, CLO, herein called the International Union, on July 30, 2001 in Case 1-CA-39256, a Complaint and Notice of Hearing and an Amended Complaint and Notice of Hearing issued on October 26, 2001 and November 20, 2001, respectively, against Shaw's Supermarkets, Inc. d/b/a Shaw's Supermarkets and Star Markets, herein collectively called Respondent. Upon a charge filed by Local 791, United Food and Commercial Workers Union, AFL-CIO, herein called Local 791, and collectively with the International Union referred to as the Unions, in Cases 1-CA-39558 and 1-CA-39568, an Order

Consolidating Cases, Second Amended Consolidated Complaint and Notice of Hearing, issued against Respondent in Cases 1-CA-39256, 1-CA-39558 and 1-CA-39568 on June 28, 2002. Upon a charge filed by Local 791 on May 29, 2002, a Complaint and Notice of Hearing issued against Respondent in Case 1-CA-39999, and a Second Order Consolidating Cases and Further Notice of Hearing issued in Cases 1-CA-39256, 1-CA-39558, 1-CA-39568, and 1-CA-39999 on August 21, 2002.

The second amended charge in Case 1-CA-39256 was filed by the International Union on September 12, 2002. The third amended charge in Case 1-CA-39256 was filed by the International Union on March 28, 2003. An amended charge in Case 1-CA-39568 was filed by Local 791 on February 6, 2002. An amended charge in Case 1-CA-39999 was filed by Local 791 on March 28, 2003, and a copy was served by certified mail on Respondent on April 1, 2003. A Third Amended Consolidated Complaint and Second Further Notice of Hearing were issued on April 8, 2003. Respondent filed timely Answers to each Complaint issued.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel, IBEW Local 103, I make the following

Findings of Fact

I. Jurisdiction

The Respondent, a corporation, with an office and place of business in West Bridgewater, Massachusetts, herein called Respondent's West Bridgewater facility, has been engaged in the retail grocery business at various supermarket locations throughout Maine, Massachusetts, New Hampshire, Rhode Island, Connecticut and Vermont. Respondent admits and I find that is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the involved Unions are labor organizations within the meaning of Section 2(5) of the Act.

II. Alleged Unfair Labor Practices

The Complaint Allegations

1. As noted Respondent Shaw's Supermarkets engages in the retail grocery business throughout New England. It acquired a competitor, Star Markets, and maintains and operates stores formerly owned and operated by Star Markets in the following Massachusetts locations:

Newtonville	Store 502
Wellesley	Store 503
Porter Square, Cambridge	Store 504
Chestnut Hill	Store 506
Mt Auburn Street, Cambridge	Store 507
Brookline	Store 508
Norwood	Store 511
Auburndale	Store 512
Lexington Street, Waltham	Store 513
Woburn	Store 514
Sudbury	Store 518
Dorchester	Store 519
Brighton Mills, Dorchester	Store 521
Quincy	Store 525

Waltham	Store 526
Winterhill, Somerville	Store 530
Prudential, Boston	Store 531
Beacon Street, Somerville	Store 536
Fenway, Dorchester	Store 538
West Roxbury	Store 539
State Street, Lynn	Store 540
Hyde Park	Store 541
McGrath Highway, Somerville	Store 547
Franklin	Store 548
North Reading	Store 550
Belmont	Store 551
Stow	Store 552
Cedarville, Plymouth	Store 554
Medford	Store 562
Morrisey Boulevard, Dorchester	Store 564
Allston	Store 565
MIT, Cambridge	Store 567
Gloucester (Eastern Avenue)	Store 570
Gloucester (Railroad Avenue)	Store 571
Ipswich	Store 572
Saugus	Store 573
Marshfield	Store 574
Hyannis	Store 575
Harwich	Store 576
South Yarmouth	Store 577
Hyannis Mall	Store 579
Orleans	Store 580
Mashpee	Store 581
Falmouth	Store 584

2. The Complaint alleges that, at all material times, the following individuals held the positions set forth opposite their respective names and have been supervisors of Respondent within the meaning of Section 2(11) of the Act and agents of Respondent within the meaning of Section 2(13) of the Act:

Carol Kearny	Manager, South Yarmouth, Massachusetts store
Michael Morales	Manager, Mattapan Massachusetts store
Michael Zajko	Assistant Grocery Manager, Plymouth, MA store
Evan Debratz	Manager, Plymouth, Massachusetts store
Brian Schwade	Manager, Marshfield, Massachusetts store
Laurie Sances	Manager, Orleans, Massachusetts store
Jessie Fleck	Manager, Harwich, Massachusetts store
Kevin Cerce	Manager, Falmouth, Massachusetts store
Frank Gillis	Assistant Manager, West Roxbury, Massachusetts store
Richard Kelly	Assistant Manager, West Roxbury, Massachusetts store
Dan Barry	Manager, Brookline, Massachusetts store
Mike Kristaiano	Customer Service Manager, Mt. Auburn St., Cambridge, Massachusetts store.
Don Antoinenes	Manager, Harwich, Massachusetts store
Carol Kearny	Manager, Yarmouth, Massachusetts store
Don Dwyer	SR Specialist

Anne Grassey	Department Manager
Al Stanwich	Store Manager
Tammy _____	Store Manager
Jim Poh	Store Manager
Kevin Scotti	Grocery Store Manager
Mike Schwade	Store Manager
Dave Brown	Store Manager
John Scuccimarra	Store Manager
Mike Hanrahan	Store Manager
John Dillon	Store Manager
Mark Truss	Store Manager
Anthony Rapoza	Assistant Store Manager

3. Since on or about January 30, 2000, Respondent has maintained and enforced a rule limiting solicitation on store property to local organizations supporting local civic and charitable activities, excluding solicitation by labor organizations.

4. Respondent, by the individuals named below, to the extent they are known to the General Counsel, about the dates and at the locations opposite their names, prohibited union and concerted activity by union agents and/or employees outside of its stores:

	Agent	Date	Location
(a)	Don Antoinenes	July 27, 2001	Harwich store (576)
(b)	Unknown	July 28, 2001	Marshfield store (574)
(c)	Unknown	July 28, 2001	Orleans store (580)
(d)	Carol Kearny	August 8, 2001	Yarmouth store (577)
(e)	Don Dwyer	August 15, 2001	Norwood store (511)
(f)	Al Stanwich	August 21, 2001	Newton store (506)
(g)	Tammy _____	August 21, 2001	Auburndale store (512)
(h)	Jim Poh	August 21, 2001	Stow store (552)
(i)	Unknown	August 22, 2001	Somerville store (530)
(j)	Kevin Scotti	August 22, 2001	Ipswich store (572)
(k)	Mike Schwade	August 22, 2001	Wellesley store (503)
(l)	Dave Brown	August 29, 2001	Franklin store (548).
(m)	Unknown	October 25, 2001	Franklin store (548).
(n)	Brian Schwade	December 10, 2001	Marshfield store (574)
(o)	Jesse Fleck	December 11, 2001	Harwich store (576)
(p)	Laurie Sances	December 11, 2001	Orleans store (580)
(q)	Unknown	February 28, 2002	Yarmouth store (577).
(r)	Unknown	February 28, 2002	Hyannis store (579)
(s)	John Scuccimarra	March 25.2002	Gloucester store (570)
(t)	Unknown	May, June, or July 2002 (a more precise date being presently unknown to the General Counsel)	Somerville store (530).
(u)	Unknown	June 2002 (a more precise date being presently unknown to the General Counsel)	Somerville store (530).
(v)	Unknown	June 2002 (a more precise date being presently unknown to the General Counsel)	MIT, Cambridge store (567)
(w)	Unknown	June or July 2002 (a more precise date being presently unknown to the General Counsel)	Somerville store (530)
(x)	Unknown	August 24, 2002	MIT-Cambridge store (567)

5. (a) On about the following dates, concerning the following locations, Respondent solicited the owner and/or entity in control of the common areas of Respondent's stores to allow Respondent to enforce solicitation rules in order to interfere with nonemployee union agents' handbilling and other activity on behalf of the Unions:

(i) July 24, 2001, and January 16, 2002, concerning the Franklin store (548).
(ii) July 24, 2001 and January 16, 2002, concerning the Ipswich store (572).
(iii) July 24, 2001 and January 16, 2002, concerning the Marshfield store (574).
(iv) July 24, 2001 and January 16, 2002, concerning the Harwich store (576).
(v) July 24, 2001 and January 16, 2002, concerning the Yarmouth store (577).
(vi) July 24, 2001 and January 16, 2002,concerning the Orleans store (580).
(vii) January 16, 2002, concerning the Stow store (552).
(viii) About July 27, 2001, January 16, 2002 and March 5, 2002 concerning the Hyannis store (579)
(ix) July 24, 2001, concerning the Gloucester store (570)

(b) Respondent, by the individuals named below, to the extent they are known to the General Counsel, about the dates and at the locations opposite their names, prohibited union solicitations and distributions by union agents and/or employees outside of the stores for which it had solicited the owner or entity in control of common areas, as described above in subparagraph 9(a):

	Agent	Date	Location
(i)	Don Antoinenes	July 27, 2001	Harwich store (576).
(ii)	Unknown	July 28, 2001	Orleans store (580).
(iii)	Unknown	July 28, 2001	Marshfield store (574).
(iv)	Carol Kearny	August 8, 2001	Yarmouth store (577).
(v)	Jim Poh	August 21, 2001	Stow store (552)
(vi)	Kevin Scotti	August 22, 2001	Ipswich store (572)
(vii)	Dave Brown	August 29, 2001	Franklin store (548)
(viii)	Unknown	October 25 2001	Franklin store (548)
(ix)	Brian Schwade	December 10, 2001	Marshfield store (574).
(x)	Jesse Fleck	December 11, 2001	Harwich store (576).
(xi)	Laurie Sances	December 11, 2001	Orleans store (580).
(xiii)	Unknown	February 28, 2002	Yarmouth store (577).
(xiv)	Unknown	February 28, 2002	Hyannis store (579)
(xv)	John Scuccimarra	March 25, 2002	Gloucester store (570)

6. From about September 7, 2001, until about November 21, 2001, Respondent caused the Flatley Company, with whom, Respondent has a lease for its Falmouth store (584), to remove nonemployee union agents who were engaged in union and concerted activity from outside the store.

7. On about August 8, 2001, Respondent, by Carol Kearny, at its Yarmouth store (577):

(a) called the police to have a nonemployee union agent ejected from outside its store;
(b) interrogated its employees about their union membership, activities, and sympathies; and
(c) instructed employees not to speak to union agents.

8. Respondent, on about the dates set forth below, by the individuals named below, and at the stated locations, prohibited employees from engaging in union solicitations and distributions outside of its stores during the employees' nonworking hours:

(a) December 10, 2001, by Michael Zajko, at the Plymouth store (554).
(b) December 10, 2001, by Evan Debratz, at the Plymouth store (554).
(c) December 10, 2001, Brian Schwade, at the Marshfield store (574).
(d) December 11, 2001, Laurie Sances, at the Orleans store (580).
(e) December 11, 2001, Jessie Fleck, at the Harwich store (576).

9. On about December 10, 2001, Respondent, by Michael Zajko, at its Plymouth store (554), told employees who were engaged in union solicitation and distribution outside the store that they were not supposed to be at the store, and that Respondent did not want union representatives on its property.

10. On about December 10, 2001, Respondent, by Evan Debratz, at its Plymouth store (554), called the police to have employees, who were engaged in union solicitation and distribution, ejected from outside the store.

11. On about December 10, 2001, Respondent, by Brian Schwade, at its Marshfield, store (574):

(a) told employees who were engaged in union solicitation and distribution outside the store that they were not supposed to be at the store and that Respondent did not want union representatives on its property; and
(b) called the police to have employees who were engaged in union solicitation and distribution ejected from outside the store.

12. On about December 11, 2001, Respondent, by Laurie Sances, at the Orleans store (580):

(a) told employees who were engaged in union solicitation and distribution outside the store that they were trespassing and they had to leave; and
(b) called the police to have employees who were engaged in union solicitation and distribution ejected from outside the store.

13. On about December 12, 2001, Respondent, by Jessie Fleck, at the Harwich store (576):

(a) told employees who were engaged in union solicitation and distribution outside the store that they were trespassing and had to leave; and
(b) called the police to have employees who were engaged in union solicitation and distribution ejected from outside the store.

14. On about February 6, 2002, Respondent, by the individuals named below, and at the locations set forth below, prohibited employees from engaging in union solicitations and distributions outside its stores during the employees' nonworking hours by causing the local police to eject them from the property:

(a) Frank Gillis and Richard Kelly at the West Roxbury store (539).
(b) Dan Barry at the Brookline store (508).
(c) Mike Kristaiano at the Mt. Auburn Street, Cambridge store (507).

15. On about February 6, 2002, Respondent, by an agent/assistant store manager whose name is presently unknown to the General Counsel but known to Respondent, at the Hyde Park store (541), threatened to call the police if employees did not cease engaging in union solicitation and distribution outside the store.

16. On about July 5, 2002, Respondent, by an agent/assistant store manager whose name is presently unknown to the General Counsel but known to Respondent, at the Morrisey Boulevard, Dorchester store (564), took pictures of nonemployee union agents in the presence of Respondent's employees.

17. (a) On about August 15, 2002, Respondent, by its agent, whose name is presently unknown to the General Counsel, but known by Respondent, at the Somerville, Massachusetts store (536), took pictures of nonemployee Union agents in the presence of Respondent's employees.

(b) On about August 28, 2002, Respondent, by Mark Truss, at the Brighton Mills store (521), took pictures of nonemployee Union agents in the presence of Respondent's employees.

The Complaint alleges that by the conduct alleged above, Respondent has engaged in conduct in violation of Section 8(a)(1) of the Act.

III. OVERVIEW OF THE CASE

A. Respondent's Solicitation Rule

1. The Rule Is Bad On Its Face

This case is, at its core, a very simple one with few disputed facts. Respondent owns and operates a large number of retail grocery stores in the New England area, some of which are unionized. As a corporate policy, it maintains a rule that permits solicitation outside its stores by certain groups that it deems desirable, while prohibiting such solicitation by other groups. Included among these other groups that are not considered desirable are all labor organizations. This case is primarily about whether Respondent violated the National Labor Relations Act by enforcing its rule against the United Food and Commercial Workers Union (UFCW) and the International Brotherhood of Electrical Workers Union, Local 103, (IBEW) when it prohibited non-employee agents of those unions, as well as its own employees, from engaging in union solicitation outside its stores.[1] Respondent freely admits that it did so. Thus, based

[1] Complaints, Amended Complaints, Answers and Amended Answers were issued and filed in this Case before the trial opened and are included in the formal documents. GC Exh. 1(a)-(lll). At the start of the trial, General Counsel withdrew paragraphs 8(e), (i), (j), and (k) from the Third Amended Consolidated Complaint. The General Counsel also moved to amend the Third Consolidated Amended Complaint based on its Notice of Intent to Amend. GC Exh. 1(mm). The General Counsel's Motion to Amend was granted over a limited objection by Respondent. Twice during the trial, the General Counsel made oral amendments to the Third Consolidated Complaint, concerning Respondent's overly broad employee no solicitation, distribution rules and these motions were granted. Respondent orally denied both of these allegations. Also during the trial, the General Counsel moved to consolidate Cases 1-CA-39256, 1-CA-39558, 1-CA-39568 and 1-CA-39999 with Cases 1-CA-41201 and 1-CA-41154. This Motion was granted and the ruling on the Motion is General Counsel's 1(kkk). Also during the trial, the General Counsel moved to amend Case 1-CA-41154, based on its Notice of Intent to Amend. GC Exh. 36. This Motion was granted without objection. Finally, on the last day of hearing the General Counsel orally moved to amend the Notice of Intent to Amend to change a date and then moved to withdraw paragraph 21 of the Third Amended Consolidated Complaint..

Continued

upon the undisputed facts in the record, it is clear that Respondent violated the Act by maintaining and enforcing its rules.[2]

2. The Rule Is Discriminatorily Enforced

Although Respondent's rule states that only charitable and civic solicitation is allowed, Respondent has allowed solicitation for purely private purposes in the areas outside its stores. The fact that Respondent has not uniformly applied its solicitation rule, and instead, has permitted other kinds of solicitation beyond the stated limits of the rule, demonstrates Respondent's discriminatory application of the rule for the purpose of prohibiting union solicitation in violation of the Act.

B. The Question of Property Rights

1. Insufficient Property Rights

Beyond the issue of the rule itself, under Board law, before Respondent can lawfully prohibit a union from engaging in solicitation outside its stores, it must demonstrate that it possesses a property right in the area outside its stores sufficient to allow it to exclude people from that area. *Food for Less*, 318 NLRB 646 (1995), enfd. in relevant part sub nom. *O'Neils Markets, Inc. v. Commercial Workers*, 95 F.3d 733 (8th Cir. 1996). As the record evidence demonstrates, at a number of its store locations, Respondent had no legal right to exclude anyone from the area outside those stores because it did not have a property right sufficient to allow it to do so. Accordingly, at these locations, Respondent's conduct in prohibiting solicitation by the Unions violated the Act regardless of the legality of its rule.

2. Soliciting Greater Property Rights

Furthermore, a separate violation of the Act occurred when Respondent, having recognized that it lacked sufficient property rights to exclude people from the areas in question, solicited from the parties in control of that property greater property rights than Respondent then possessed, and thereafter excluded union solicitors based on these acquired rights. This is what happened at several of Respondent's stores, and is independently violative of the Act.

C. Respondent's Exclusion of Its Own Employees

As will be demonstrated, Respondent's violations of the Act based upon the enforcement of its unlawful rule and based upon its lack of property rights, discussed above, apply equally to situations where Respondent excluded non-employee union agents from outside its store locations, and to situations where Respondent excluded its own employees employed at its already unionized stores from those same locations. Additionally, however, Respondent's exclusion of its own employees from non-working areas outside certain stores, merely because they were engaged in solicitation for a union during their non-working time, violated the Act for the further reason that Respondent had no business justification for excluding these employees. Moreover, this is so despite the fact that the employees in question were "off site" employees of Respondent in that they were employed at stores other than the ones outside of which they

These motions to amend were allowed without objection.

[2] It appears that Respondent is pursuing this case in hopes of changing current Board law in this area. In this regard, Respondent placed a great deal of evidence on the record that is irrelevant to the determination of the case under existing Board law. This irrelevant evidence appears aimed at allowing Respondent to make its arguments on appeal to the circuit courts. Nevertheless, these facts are included, and addressed, where appropriate.

were soliciting.

D. Respondent's Additional Violations of the Act

In addition to the violations of the Act referred to above, the Complaint alleges, and I will address below, Respondent's separate conduct violative of Section 8(a)(1), including interrogating employees, impliedly threatening employees, photographing non-employee union solicitors in the presence of employees, and maintaining an overbroad solicitation rule concerning employees.

IV. Facts -UFCW

Respondent operates a large chain of retail grocery stores throughout New England which, prior to 1999, were all called Shaw's Supermarkets. The United Food and Commercial Workers Union, Local 791 (Local 791) represents Shaw's employees working in 39 of the Shaw's locations in Southeastern Massachusetts and Rhode Island.

Respondent and Local 791 have had a long-standing collective-bargaining relationship. In Massachusetts, Local 791 represents employees working at Shaw's stores in Bristol, Norfolk and Plymouth Counties. Shaw's non-union stores in Massachusetts include a number of non-union stores within the geographical jurisdiction that Local 791 represents.

In about June 1999, Respondent's then-parent company purchased a chain of retail supermarkets called Star Markets. Some of these Star Markets have since been renamed Shaw's Supermarkets, while the remainders have maintained the Star name. None of the Star Market locations (including those that have since been renamed Shaw's) are unionized. The Star Market and Shaw's stores are run as a single enterprise.

A. The UFCW's Solicitation Efforts

Since July 2001, the United Food and Commercial Workers International Union, AFL-CIO, CLC (International) has been engaged in a campaign to organize Respondent's non-union stores in Massachusetts. This is an ongoing campaign in which the International has, at times, coordinated directly with Local 791. During this three year period, UFCW representatives have attempted to organize Respondent's employees by talking to them outside of Respondent's stores,[3] and handing them various handbills with information about the UFCW and about Local 791's collective-bargaining agreement with Respondent. The non-employee UFCW representatives would only approach and solicit employees or give them literature if they were "absolutely certain" the employees were on break.

B. Respondent's Non-Employee Solicitation Rule

Respondent maintains and enforces rules pertaining to solicitation by non-employees and employees alike. The primary focus of this case involves Respondent's rules concerning solicitation by non-employees. With respect to non-employees, including agents of the UFCW, IBEW, or any other labor organization, Respondent admits that its rule permits solicitation outside its stores by certain non-profit, civic and charitable groups that it deems desirable, while

[3] During the initial six-month organizing period, there was a blitzing campaign in which UFCW representatives visited the inside of the stores and talked to employees even while they were working. After this time, however, the UFCW representatives were engaged in solicitation of and distribution to Respondent's employees strictly outside of Respondent's stores.

at the same time it prohibits non-employee union agents from soliciting and distributing handbills to its employees outside its stores. Thus, pursuant to Respondent's Associates Handbook dated March 2003, Respondent prohibits non-employees from soliciting and distributing literature and other materials for any purpose at any time within Shaw's buildings and property with the exception of solicitation for charitable purposes. Respondent relies on this rule to justify its prohibition against solicitation on behalf of the UFCW, IBEW, or any other labor organization outside its stores. Although Respondent offers various explanations for this policy, under Board law, none of these explanations are relevant to a determination of the legality of Respondent's rule, since the Board has explicitly rejected the kind of distinction Respondent wishes to draw between permitted organizations and labor organizations.[4]

The only relevant inquiry under Board law is Respondent's admission in its Answer to the Third Amended Consolidated Complaint that it maintains and enforces a rule at all of its listed stores which prohibits labor organizations from soliciting at its stores while allowing other non-profit, civic or charitable groups to do so. In addition to its Answer, Respondent entered into a joint stipulation identifying some of the specific stores at which it enforced this rule. The locations identified in the joint stipulation are those for which the General Counsel believes Respondent cannot meet its burden to show it had a sufficient property interest to exclude labor organizations, as discussed below. At these locations, Respondent admits it maintained and enforced its no solicitation policy by asking non-employee Union agents to leave the parking lots, sidewalks/walkways, and other common areas outside Respondent's stores and by calling the police to have them removed if they did not leave voluntarily.

It is also significant to note that Respondent's solicitation rules have evolved over the course of the Unions' campaigns and this trial. When the UFCW first started visiting the Star Market/Shaw's Supermarket stores that are at issue in this case in 2001, the rule with respect to permitted non-employee solicitation that was in effect, according to Eric Nadworny, Respondent's Vice President of Labor Relations, did not specifically state that the only solicitation allowed by Respondent was that of a civic or charitable nature. [5] The only reference in the rule to charitable solicitation was in a provision stating that "Solicitors must state the name of their organization and their charitable cause when asked by a customer. . . ." The rules also provided that solicitors may not approach customers for a contribution, they may not ask customers for a contribution, they may not distribute any printed materials, they must not cause customers to congregate in the soliciting area, they may not obstruct, harass or pressure customers in any way, they must adhere to any requests made by the store manager including requests that solicitors under the age of 18 be accompanied by a parent, that they may display only one poster, and that they may not cause littering. These rules also placed limits on the number of solicitations a store may allow. Thus, a store could only allow one organization to solicit at one time and no more than two organizations could solicit during a four-week period. Under the rule, organizations were allowed to solicit once a year for a period of no longer than two consecutive days and they had to apply each time they wished to solicit.

[4] As will be discussed below, the evidence does not support Respondent's claim that its policy, as implemented, actually limited solicitation to charitable and civic groups.

[5] Nadworny had also testified that the solicitation distribution rule appearing in the March 2003 handbook was "essentially" in effect since 2001, as far as he was "aware." It is evident, however, that it was not.

As the UFCW's campaign intensified and their efforts were centered on speaking to off-duty employees and employees on break outside Respondent's stores, and subsequent to the UFCW's filing of charges against Respondent for prohibiting Union solicitation outside its stores, in January 2002, Respondent revised its solicitation rule, this time to specifically state that it would allow only civic and charitable solicitation. The revised rule states:

> Shaw's Supermarkets, Inc. will permit solicitation and/or distribution of literature on property owned or leased by it only for civic and/or charitable purposes that the company believes will be of benefit to its customers and enhance its relations within the community served by that store.

Likes its predecessor, the revised rule also placed limits on this solicitation. Thus, store managers could authorize solicitation under the rule only if all of the foregoing conditions were met:

a. Store management received a written request from the organization on stationary bearing the name of the organization;
b. A release of claims form was signed by a legal representative of the organization before the solicitation commenced;
c. Only one organization could solicit at a time;
d. Solicitation was limited to two days of the week specified by the manager;
e. Solicitation was limited to a two week period each month;
f. Each organization was limited to one two-day solicitation per year;
g. Solicitation to occur outside the store except during inclement weather, when it could occur in the vestibule;
h. One poster for display;
i. Distribution of printed material allowed, but not littering;
j. Passive solicitation only, with solicitors remaining in one location unable to approach or pursue customers to actively solicit them;
k Solicitation may not impede the passage of customers or associates; and
l. Solicitors under 18 require a parent to accompany them.

C. Respondent's Attempts to Prohibit and Interfere with the UFCW's Solicitation Efforts

There is no dispute that Respondent tried to prohibit the non-employee UFCW representatives from organizing outside its stores and, in so doing, enlisted the help of the police and the landlords from whom it rented the stores, and, in some cases, issued no-trespass notices on its own initiative. Respondent admittedly did so pursuant to its solicitation rule allowing certain groups other than unions to engage in solicitation in the very same locations. Respondent also interrogated employees, impliedly threatened employees and photographed the non-employee solicitors in the presence of employees.

1. Police Involvement

Respondent's managers routinely called police to have UFCW organizers removed from outside its stores when the organizers attempted to talk to Respondent's employees while the employees were on break in common areas outside the stores. Jt. Exh. 1. Typically, within a matter of minutes after the union organizers appeared at a store, a store manager would approach them, ask them to leave, and warn them that if they did not leave the police would be called. The organizers would then let the manager know that they believed they had a right to be there and that they would not leave, but that they understood the manager was going to call

the police and that the manager should do what he or she had to do. The police would then arrive and, typically, tell the union organizers that they had to leave.

Respondent admits that this was what routinely happened outside its store locations, and it issued a written directive to certain store managers regarding how to respond to activities involving Local 791. Nadworny testified that this written directive was consistent with Respondent's instructions to store managers. In this directive, dated August 8, 2001 and authored by Cindy Garnett, Respondent's Human Resources Director, Respondent notified certain store managers of the following: "You should be aware that your property is either owned by Shaw's or you have responsibility for common area maintenance (CAM)." With respect to Local 791, Garnett continued "this means that they cannot be in the store or the parking lot, and must conduct their business in a public access area off the premises." Further, Garnett instructed these managers that should the picketers/organizers refuse to move, the manager should contact the local police and ask to have them removed." Finally, Garnett encouraged the managers to show the memorandum to the police officer and, as UFCW organizer Bart Pyle testified, they did.

Organizer Pyle testified that he solicited employees in the parking lot at Respondent's South Yarmouth store on August 8, 2001, when he was asked to leave, first by the manager, and then by the police. When the police told him that he had to leave the property, the officer cited the Garnett memorandum and gave him a copy.

2. Landlord Involvement

Respondent also enlisted the help of the landlords from whom it leased its stores to exclude UFCW organizers from outside store premises by sending landlords different letters at various times during the UFCW's campaign in which it solicited the right to exercise the landlords' authority to remove the union organizers from outside the stores. In a first set of letters sent to landlords in July 2001, at which time Respondent had not yet reached agreement on a successor collective-bargaining agreement with Local 791, Respondent anticipated that, as part of possible strike activities, Local 791 representatives might visit store locations and engage in "various activities." In these form letters, Respondent notified the landlords of possible union activity at its stores and claimed that "Shaw's and/or Star Markets and you may have legal rights to limit or prevent such union action." In these letters, Respondent informed the landlords that "We are willing to assume your responsibility for maintaining your property in the event of picketing or other job actions. To allow us to take over this responsibility, please countersign in the space provided below and return…."

Similar letters were again sent to some of Respondent's landlords on January 16, 2002 and March 5, 2002. Respondent identified the union activity it was concerned about in these letters, saying that is consisted "mainly of two or three individuals coming onto your Shaw's/Star private property and attempting to solicit and hand out literature to Shaw's/Star employees." In the letters, Respondent requested that each landlord designate Respondent as its agent for the purpose of enforcing the landlord's "NO TRESPASS, NO SOLICITATION AND NO DISTRIBUTION policies in the parking lot and other common areas of your property."[6] Respondent admits that it only solicited its landlords for the right to remove union solicitors and not any other group.

[6] The record contains very little evidence on which landlords actually had a no solicitation policy, or whether such policy was intended by the landlords to be applied in the parking lots and other common areas of their property.

Respondent was successful at obtaining permission from a number of its landlords to act as their agent as it had requested in these letters.[7] Indeed, Respondent admits that, at least with respect to the locations identified in paragraph 4 of Jt. Exh. 1, the landlords authorized Respondent to enforce solicitation and distribution rules to remove union agents from the parking lots, sidewalks/walkways, and other common areas outside Respondent's stores. Additionally, Respondent admits that at least at its Harwich, Orleans, Marshfield, and Hyannis stores, when Respondent called the police to have non-employee union agents removed from its stores, it showed the police copies of letters executed by landlords authorizing it to enforce solicitation and/or distribution rules in the parking lots, sidewalks/walkways, and other common areas outside Respondent's stores.

3. Specific Instances at Respondent's Stores

a. South Yarmouth

Respondent's letters apparently also had an impact in South Yarmouth. Patrick Connors testified about his attempt to talk to employees at that location on February 28, 2002. On that occasion, Connors went with Local 791 representative Bruce Farley to talk to Respondent's employees, provide them with literature concerning TOPPs, and clarify whether the union agents were going to be able to talk to employees or not. Connors and Farley were standing on the sidewalk, about 10-15 feet away from an entrance to the store, talking to employees for about 10 minutes. At that point, a store manager came out and spoke to them.[8]

The store manager introduced himself to Connors and Farley and told them that they were not going to be able to remain speaking to employees and distributing literature where they were standing. The manager told them that they would have to leave the property, and that if they did not leave the property he would call the police. Connors testified that he and Farley told the manager that he would have to do what he had to do and that the manager then went back inside the store.

Connors and Farley remained where they were standing for a short time when a South Yarmouth police officer arrived. The officer went into the store and then came back outside to where Connors and Farley were standing. The officer told Connors and Farley that they would have to leave the parking lot. While telling Connors and Farley that they would have to leave, the officer referenced a letter from the landlord of the shopping center that he said gave Respondent the right to ask them to leave and to refrain from doing what they were doing (talking to employees and distributing the TOPPS handbill). The officer also told them that if

[7] Nadworny denied that the letters were seeking a right that Respondent did not already have, claiming that Respondent only wanted to clear up any ambiguity for the police. Nadworny also admitted at one point in his testimony, however, that these kinds of letters were not sent to all landlords, but only where there was a need for clarity. Later, Nadworny testified that Respondent did not send the letters because there was ambiguity in the leases, but rather, because Respondent was simply being prudent. Nadworny admitted that at least one landlord refused to provide Respondent with the authority it sought in these letters.

[8] Connors was able to identify this individual as a store manager either by his name tag or his clothing. Connors testified, as did several other witnesses that store managers and assistant store managers wear name tags identifying their name and their position, and that managers wear different clothing from the ordinary employees. Managers wear button down collar shirts, while the rest of the workers typically wear a polo knit shirt, usually blue if it is a Star Market store, or green for Shaw's. Respondent's department managers may wear polo shirts, as well, but department managers are included in the bargaining unit represented by Local 791, and, as is addressed below, Respondent's argument that these employees are supervisors within the meaning of the Act should be rejected. Regarding Respondent's dress code policy, while Nadworny testified that the policy was in effect in June of 2000, there was no testimony offered regarding whether the policy is actually followed and what impact, if any, the policy had on the way Respondent's managers traditionally dress. R. Exh. 60.

they ever returned to that store, they would have to remain on the public sidewalk near one of the entrances into the parking lot. The officer later gave Connors and Farley a copy of the landlord's letter.

In the letter that the officer provided to the union representatives, David Bisbee, Property Manager for Davenport Realty, informed Chief Peter Carnes of the Yarmouth Police Department that Respondent, its tenant, had advised it of a "possibility of union picketing at or near the building leased to them or at the entrance/exist [sic] of the plaza." In the letter, Bisbee advised Chief Carnes that it was his position that the picketers would be trespassers and asked him for his "assistance in protecting our right if and when I call upon you."

b. Norwood

Respondent also asked for, and ultimately obtained, authorization from its Norwood store's landlord to prohibit union activity at the Norwood store. [9] In his letter to the landlord, Respondent's attorney, Richard Moon, summarized Respondent's view of the UFCW/Local 791 organizing campaign. Attorney Moon also offered Respondent's view regarding why the Norwood store was a frequent target of the UFCW's campaign and stated, "The principal reason is that Shaw's does not control the space outside the store premises and therefore has not been able to ask the union organizers to leave." In the letter, Attorney Moon suggested that the landlord request that Respondent enforce the landlord's policy of permitting only civic and charitable solicitations and Respondent would be willing to do this while holding the landlord "harmless against any litigation" for such a policy. Attorney Moon also noted in this letter that Respondent "hopes that you choose to assist your tenant in achieving its legitimate business objectives; but of course we recognize that the decision is entirely Gravestar's." In a letter dated October 11, 2002, the landlord did give Respondent what it had requested, the right to enforce its solicitation policy so long as Respondent assumed all liability for this action.

c. Falmouth

At the Falmouth store location, Respondent involved both the police and its landlord, the Flatley Company, in an effort to prohibit the UFCW from soliciting outside the store. Flatley owns the shopping center in which Respondent operates its store. [10] There are other businesses located both to the left and right of the store. Respondent also made use of a no trespass notice, which, as more fully described below, is a letter from Respondent prohibiting Union representatives from having access to Respondent's store property, including parking lots, for anything other than regular business purposes, and threatens that Respondent will request the police to arrest and remove violators.

1) Flatley is involved

Respondent originally operated a Star Market at the Falmouth location, which it replaced with a Shaw's Supermarket on about September 7, 2001. As was the case at the other store locations mentioned above, prior to the September 7, 2001 opening of the Falmouth Shaw's, Respondent enlisted the help of Flatley to exclude non-employee union representatives from engaging in activities outside its stores. In this regard, Respondent sent Flatley a letter dated July 24, 2001, which was similar to those it sent to its other landlords, referred to above,

[9] Nadworny testified that Respondent had its attorney write the letter to the Norwood landlord because, based upon a letter sent to the Norwood police by the UFCW's attorney, the police would not prohibit UFCW organizers from soliciting outside the Norwood store.

[10] Falmouth, Massachusetts is located in Barnstable County which is within the Union's geographical jurisdiction.

concerning its contract negotiations with the Union. In this letter, Respondent warned Flatley of the possibility of picketing and leafleting at the store in Falmouth and stated its desire to assume Flatley's responsibility for maintaining the property in Falmouth in the event of union picketing or other job actions. Respondent requested that Flatley countersign the letter to authorize Respondent to take over Flatley's responsibilities in this regard, which Flatley did.

In anticipation of the September 7, 2001 opening of the new Shaw's Supermarket in Falmouth, Respondent sent another letter to Flatley dated August 30, 2001. In this letter, Respondent warned Flatley that although it had reached a contract agreement with the Union and averted a strike and protest situation, Respondent believed that the Falmouth store would be "the target of further protests by Local 791 beginning at the opening of the store" in the form of picketing and leafleting. As it had done previously, Respondent advised that Flatley and Respondent may have legal rights to limit or prevent such Union action and reminded Flatley that it had earlier countersigned a letter from Respondent giving Respondent responsibility for maintaining Flatley's property in the event of union activity occurring there. Respondent then requested Flatley to countersign the letter to allow Shaw's to continue exercising this responsibility at the new Falmouth Shaw's, which Flatley did.

2) The Falmouth police are involved

On September 7, 2001, Union Organizers Michael Connors and Robert McClay went to the Falmouth store to try to speak to Respondent's employees about the Union. According to Connors, he and McClay arrived at about 1:30 p.m. As they were on the sidewalk that separates the parking lot from the shopping center, walking toward the store, they passed a Falmouth police officer. This was a detail officer who Respondent had hired for the opening of the store, as was its practice. Connors greeted the officer as they walked past each other. The officer then stopped and asked Connors and McClay if they were from the Union, saying that he had heard that there might be some type of protesting or picketing there that day. According to Connors, McClay replied that they had a handout to give to employees and that they were there to talk with employees about the benefits of belonging to a Union. Connors testified that the officer left and went back into the store while Connors and McClay remained outside the store by the right entryway. Connors testified that he and McClay stood by that entrance in hopes of speaking with employees, because there was a bench there so it appeared to be a place where employees would take their breaks.

McClay and Connors were not able to speak to any employees while they were there, however, because after the officer went inside, he came back out with Store manager Kevin Cerece. Connors believed that the assistant store manager was also present. Connors testified that when Cerece and the assistant store manager came out with the officer, they asked him and McClay to leave. Connors recalled that Cerece had a letter from the landlord that gave him the authority to have anyone removed from the property. McClay also had a document with him that contained an article entitled "Organizers Have Access to Shopping Center Parking Lots" that he showed to the officer. At this point, other personnel from the store came out and additional police came to the scene. When the other officers arrived, McClay and Connors decided that it was time to leave.

On September 25, 2001, Connors and McClay returned to the store because they believed that Local 791's attorney, Warren Pyle, had reached an agreement with the Falmouth town counsel that the police would not prohibit Union representatives from remaining outside the store to speak with Respondent's employees. This time they went to the left entrance by a T.J. Maxx store. Connors testified that they picked that entrance because they believed that the employees parked in that area and entered Respondent's store from there. Again, Connors and

McClay were not able to speak to any employees while they were there because Assistant Store Manager Brendan Ahearn came out and asked them to leave. Connors and McClay did not leave as Ahearn asked, stating that they believed they had a right to be there. Thereafter, Ahearn called the police and two police cruisers and another car with a police sergeant came to the store. Also, at about that same time, John Dougherty, the property manager from Flatley, came out and joined them. The police asked for Connors' and McClay's licenses and Dougherty gave them no trespass notices.

Thereafter, in about mid-November 2001, Michael and Patrick Connors spoke to the Chief of Police for the Falmouth Police Department. According to Connors, the Chief advised them that the Falmouth police were no longer going to involve themselves in the dispute between Respondent and the Union. The Chief advised that the police would allow the Union to access the parking lot and that if Shaw's wanted to try to prohibit that access, they could take the matter to court.

As a result, Michael Connors and Carlos Ferreira went to the Falmouth store on November 21, 2001. Connors and Ferreira went to the left entrance of the store – the same one that he and McClay went to on September 25, 2001. Again, Assistant Store Manager Brendan Ahearn came out and asked them to leave. Connors told Ahearn that they would not leave because they believed they had a right to be there. Ahearn went back into the store and came out again with Store Manager Kevin Cerece. Cerece asked Connors and Ferreira to leave, but again they refused. Connors said that Cerece and Ahearn then brought out Dougherty, who also asked them to leave. Connors then explained to Dougherty how he (Connors) had been to the police station and was told that the police would not get involved in this, that if Shaw's wanted to have them removed from the property, Shaw's would have to go to court. Knowing that the police would be called, Connors explained that if there was some misunderstanding of the facts on his part, he and Ferriera would leave. Dougherty, Ahearn, and Cerece left and the police arrived.

When the police arrived, they spoke with Ahearn, Dougherty, and Cerece at the right entrance to the store. A sergeant walked over to Connors and Ferriera and said that the town counsel had researched the matter and the police were no longer to get involved in the matter, provided that the Union representatives behaved themselves and there were no problems. Consequently, Connors and Ferreira were allowed to remain outside the store.

Thereafter, Respondent's Counsel, Richard Moon, had direct communication with the Falmouth police chief and exchanged correspondence with Town Counsel for Falmouth over the police department's refusal to remove UFCW representatives from outside Respondent's store – at one point apparently threatening to bring security guards to the mall to assault union activists in the parking lot. By letters dated December 6, 2001, Flatley and Respondent issued no trespass notices to the UFCW. [11]

Connors states that in discussing this matter with Shaw's management, Shaw's management said that the Union had to solicit on the street. At no time did Connors, Ferriera or McClay enter the store while they were present on theses occasions.

[11] Respondent also sent an additional piece of correspondence to Flatley, dated August 6, 2001, advising Flatley that Respondent would defend Flatley against any unfair labor practices charges the UFCW might file against Flatley arising out of the UFCW's effort to organize the Falmouth store. GC Exh. 9. For the purposes of this case, Respondent's Counsel also represents Flatley.

d. Mansfield

Respondent opened its Mansfield store to the public on August 22, 2003. Since about August 1, 2003, full-time and part-time employees were working in the store. Prior to August 22, 2003, these employees were stocking shelves and carrying out a variety of preparation work. Respondent admits that on August 11, 21, 22, and 23, 2003, it prohibited solicitation of its employees by non-employee union agents in areas located outside the store by asking them to leave those areas and by calling the police to have them removed if they did not leave voluntarily.

1) A No Trespass notice is used by Respondent

By letter dated August 28, 2003, Respondent issued a no trespass notice to the Union to prohibit union solicitation and distribution at its Mansfield store. The letter states that:
No agent or representative of [Local 791] is permitted to enter the property on West Street at Route 40 in Mansfield, Massachusetts including the parking lot for purposes of solicitation, distribution or any other activity, except engaging in the legitimate business purposes for which the store at such location operates.

The Letter Threatens that Respondent will Request the Police to Arrest and Remove Violators

Respondent sent another letter to the UFCW's attorney, Warren Pyle dated September 3, 2003 restricting the Union's right to solicit and distribute at the Mansfield store. By this letter, Respondent agreed to allow the Union access to the Mansfield store for purposes of solicitation and distribution provided that: it was limited to two individuals; located at least 75 feet from the store; that they not solicit anyone that asks not to speak with them or rejects their material; and that they not cause disruptions and that they remove themselves from outside the store upon completion of the hiring process. Respondent sent a follow-up letter to Pyle dated October 21, 2003. In this letter, Respondent announced that the hiring process at the Mansfield store had ended and requested that the Union remove themselves from the store including the parking lot.

Respondent's Interrogation of Employees and Implied Threat of Negative Consequences - South Yarmouth.

International organizer Bart Pyle testified about his attempts to talk to employees at the South Yarmouth store location. Pyle testified that when he visited stores he would basically just talk to workers about organizing a union when they came out of the stores. Pyle would sit down and talk with them and see if they had any interest in forming a union. This, Pyle testified, was his purpose in going to the South Yarmouth store on August 8, 2001. On that occasion, Pyle was with Mike Grasiday, who works for Local 791.

When Pyle and Grasiday first arrived at the store, they were sitting in a car and, as workers came out of the store, they would try to talk to them.[12] At one point, Grasiday left the car to talk to a couple of employees and Pyle remained in the car, watching. Pyle saw Grasiday talking to the employees on a corner bench outside the store. Pyle could hear some of the back and forth between Grasiday and the workers, and Grasiday told Pyle about it. Based on this, and their clothing, Pyle knew that these were workers and that they worked as baggers on the front end of the store. After talking to the workers, Grasiday was returning to the car when a

[12] Pyle testified that the car was parked in the closest parking space next to the store.

woman came out of the store and approached the workers. Pyle later learned that this was Carol, the store manager.[13] Pyle testified that as this woman approached the workers, his ear perked up because he was interested in hearing what she had to say to these workers. Pyle heard her asking them "was that the union you were talking to?" Pyle heard them say yes, it was Pyle then heard Carol say "you don't need to be talking to the Union."

After hearing that interaction, Pyle sat in his car waiting for more workers to come out of the store and eventually one did. Pyle and Grasiday then went over and talked to him on the bench for a couple of minutes. This employee was interested in the Union and the conversation lasted about five minutes. Pyle and Grasiday then returned to the car. When they were doing this, Carol, the manager, the same woman who had talked to the workers before, came out of the store again and spoke with the employee Pyle and Grasiday had just talked to on the bench. Pyle and Grasiday could not hear what Carol said, but after she walked back into the store, they rolled down the car window and asked the employee what she had said to him. When Pyle asked the worker what was said, the employee approached the car, which Pyle guessed was so that he could hear him better. After the employee told Pyle and Grasiday what the woman said to him, the employee returned to the bench. Pyle could see Carol come back out of the store and confront him. At that point in time, both Carol and the employee went back into the store together.

Pyle and Grasiday remained in the car, but no other employees came out of the store after that. Pyle cannot recall exactly how much time passed before Carol came out again and started writing down Grasiday and Pyle's car's license plate number. Pyle rolled down the window and said to her "can I help you?" She responded "well, you are trespassing." She further said "you're going to have to leave, you're on our property." Pyle responded that they had a right to be there. She then said "I'm going to have to call the cops." Pyle responded that he understood that she had a job to do and that they, too, had a job to do.

About 30 minutes after that interaction, the police arrived at the store. Pyle saw a police officer leave his car, go into the store, come outside and then come over to Grasiday and Pyle. The officer said that he was going to have to ask them to leave. Pyle told the officer that they had a right to be there. He replied that the company said they did not have a right to be there and that they have a letter saying that you are trespassing and not allowed to be on their property. Pyle then asked for a copy of the letter. The officer then went back into the store and returned with the letter a couple of minutes later, which the officer had received from the store manager, and gave to Pyle. Pyle told the officer that the letter was a bit vague, but the officer said that they had to leave because if they did not, this was going to go on all day. Pyle and Grasiday left at that point.

On cross-examination, Pyle denied that he was involved in blitzing Respondent's stores, or that he ever went into any of Respondent's stores to solicit employees. Pyle was shown a copy of a paper entitled "Shaw's/Star Blitz assignments," dated 7/01. This list offered by Respondent was attached to a document entitled "Defendant United Food and Commercial Workers International Union, AFL-CIO-CLC's Answers to Plaintiff Shaw's Supermarkets, Inc.'s First Set of Interrogatories." This document is apparently something Respondent received in discovery as part of its harassment, defamation, and trespass lawsuit against the UFCW, which Respondent withdrew. In this list, which came into evidence without any explanation or

[13] Pyle learned she was a manager from one of the employees he talked to and from her name-tag. Pyle also could tell she was a manager from the clothes she wore. Respondent admits in its Answer to the Third Amended Consolidated Complaint that Carole Kearney, who testified on Respondent's behalf at the trial, was a statutory supervisor. There was no Assistant Store Manager at the South Yarmouth store during this period of time.

discussion, Bart Pyle's name appears next to the Waltham store. Pyle's name is not listed next to the Yarmouth store and, on page 8 of this same exhibit, in identifying for Respondent the location and date where individuals solicited and distributed literature to employees, Pyle's name does not appear next to the Waltham store.

Carole Kearney, a general merchandise manager and key holder at Respondent's South Yarmouth store, testified on behalf of Respondent. Although on direct examination Kearney testified to events that occurred on August 8, 2001, she later admitted that she did not really know when the events she testified about occurred. She also admitted that there were union people outside of her store on at least one other occasion and that they were in the parking lot, though for some reason she did not call the police on that occasion, even though she had been instructed to do so. Kearney also could not recall how she knew those individuals outside were union people.

Kearney testified about the only time she says she called the police about union activity. Kearney testified that she was in charge of the store on the day she called the police about the Union.[14] Brian Sway is the store manager, but he was out that day and there is no assistant store manager. On that occasion, Kearney heard from another employee that the Union was inside the store and distributing literature. Kearney found the Union person and, since he did not belong in the store, asked him to leave. Kearney stated that the Union person said that he did belong in the store and that she then asked him to please leave. Kearney claimed that the Union person then said that she did not know what she was talking about. Kearney testified that she said please leave "I have papers on you, you're trespassing." According to Kearney, the man then said that she did not have papers on him and she again asked him to leave. According to Kearney, she then walked this man out of the store, although Kearney was careful to state that she never actually left the store, but remained in the vestibule of the store. Kearney then called the police, who came right away. Kearney denied ever having instructed any employees not to speak to the Union.

Kearney's testimonial inconsistencies included her testimony about being a key holder. While, at first, Kearney testified that she was a key holder, as were all department managers, when she was informed that this was inconsistent with other testimony, she changed her answer and testified that most of the department managers have a key and that they are trained on opening and closing the store. Kearney testified that it was the fact that she was a department manager that made her a key holder.

Kearney also gave inconsistent testimony concerning her role in instructing those solicitors who are permitted by Respondent to solicit at the store. On direct examination, Kearney testified that she instructs the solicitors on where to stand and about what they are allowed to do. Kearney testified that she would instruct the solicitors on what they could and could not do. She instructed the solicitors on where they could be stationed and the fact that they were not permitted to group around and follow people to ask them to donate. On cross-examination, however, Kearney testified that she didn't know whether solicitors were allowed to approach a customer and that the extent of her instructions to solicitors was to go outside to the exit door where the manager told her they were supposed to be.

[14] Kearney testified that as a department manager, she sometimes wore the same kind of shirts that the "associates" wear. Kearney also testified that the store manager dresses differently than she does and he wears button down shirts.

4. Respondent's Photographing of Solicitors in the Presence of Employees

a. Somerville

Emily Hardt worked as an organizing intern for the International Union in the summer of 2002 and after that became a Union organizer.[15] During the months of May through October 2002, Hardt visited Star Market stores in Boston, Cambridge, and Somerville to talk to employees about the Union. Hardt talked to employees only and only talked to them outside of Respondent's stores. Hardt says employees wore bright blue shirts with the Star Market logo, or sometimes green shirts with the Shaw's logo. Employees also wore name tags. Managers generally wore buttoned-down shirts with khaki type pants and name tags.

Hardt visited the Somerville Star Market store on Beacon Street on about five to eight occasions. When visiting this store to talk to employees about the Union, Hardt would stay outside the store, in the parking lot or on the sidewalk in front of the store. On one occasion, while Hardt was standing outside the store, she saw an employee leave the store and walk over to his car, which was parked against the fence at the far edge of the parking lot. The employee then sat in his car and smoked a cigarette. Hardt went over to the employee and initiated a conversation.

Hardt continued to talk to the employee with her back to the store. Unbeknownst to Hardt, while she was talking to the employee, a manager had come up behind her. When Hardt turned around the manager took her picture. The employee was not in the car when the picture was taken. Hardt told the manager that he did not have a right to take her picture. Then the manager walked back into the store and the employee who had been talking with Hardt followed the manager into the store. Hardt testified that the people present when the manager took her picture were herself, the employee with whom she had been speaking, and the manager.

While Hardt testified on cross-examination that she turned her back on the employee when the manager took her picture, Hardt later testified on redirect examination that it only took one second for the manager to take the picture and that after the manager took the picture, the employee she had been talking to follow the manager back into the store.

Hardt knew that the manager who took her picture was a manager because she was familiar with this individual, since he had asked her to leave the store on other occasions and because he wore khaki pants and a buttoned-down shirt. Hardt left the store when asked to do so, but she did return on later occasions.

Hardt remembers that there were occasions when she gave managers her name and she cannot recall any occasion when she refused to give her name to a manager when asked. When asked by managers who she was with, Hardt would tell them that she was with the Union. Hardt does not recall whether she gave her name to the manager at the Somerville store. There was no evidence that the Somerville manager asked Hardt her name and Respondent did not offer the manager or any other witnesses to testify about this incident.

[15] Hardt explained that though she was actually employed by the AFL-CIO as an intern she worked for the UFCW.

b. Brighton Mills

During her internship with the Union, Hardt also had occasion to visit the Brighton Mills store about three times. As was the case with the other stores she visited on behalf of the Union, Hardt went to this store to talk to employees about the UFCW. Hardt testified that on one occasion in early June of 2002, when she visited this store with interns Kim Foltz and Dave Burt, a manager took her picture.

Hardt testified that while she was standing on the sidewalk in front of the bagel shop that is connected to the store, a manager came out of the store with a camera. The manager had an employee with him, following one step behind him. Hardt thought she was about 30 feet from the store entrance at that time. The employee was wearing the Star Market shirt and the manager was wearing khaki pants and a button-down shirt, and he had a name tag that identified him as Mark Truss, the manager. Truss first asked Hardt and the other interns she was with who they were with. Hardt and the others told him they were with the Union. Truss then responded that he needed to take their picture. When they asked Truss why he had to take their picture, Truss said that he had been instructed to do so. The interns then objected to this and said that they did not want their picture taken and Hardt started to turn and walk away. Truss took their picture anyway, saying that if they wanted to be there, he had to take their picture. When Truss reentered the store, the employee who had been with him reentered the store, as well.[16]

Intern Kimberly Foltz corroborated Hardt's testimony concerning Respondent's picture taking activity at the Brighton Mills store. This testimony was stricken on the ground that it was cumulative.

D. Respondent's Rules Governing Employee Solicitation

Effective March 2003, the rule governing solicitation and distribution by Respondent's employees was set forth on page 33 of the Associate Handbook dated March 2003. The rule provides:

> Associates are prohibited from soliciting during their work time and during the work time of associates being solicited. Associates are also prohibited from distributing literature or other materials during their work time and during the work time of other associates to whom distribution is made. Work time does not include lunch breaks, break periods or other authorized time during the workday when associates are not required to be working. Associates are prohibited from distributing literature or other materials at any time in work areas.

Although the above rule appears to be lawful on its face, at the trial on October 2, 2003, Vice President of Labor Relations Nadworny testified that pursuant to this rule, off duty employees are prohibited from discussing the Union outside the stores in the parking lot.

Respondent amended its rule governing solicitation and distribution following Nadworny's testimony. Pursuant to the amended rule, which became effective in January 2004,

[16] On cross-examination, Hardt testified that she was not sure if she had seen the employee's name-tag, so that it was possible the employee was a department manager. As will be discussed, there was no evidence that department managers are supervisors within the meaning of the Act. Indeed, the department managers are not considered supervisors by Respondent in its UFCW represented stores, since those employees are included in the Local 791 bargaining unit.

associates are still prohibited from engaging in solicitation of another associate for any purpose during their own work time or the work time of the associate being solicited. The rule now prohibits solicitation by associates "in those areas of the store used by customers to shop (shopping areas) or by store personnel to service customers' needs (selling areas)." Thus, under the rule as amended, solicitation during non-working time is permitted in break rooms and work areas not used for selling and or shopping. The amended rule defines sales and shopping areas to include "areas outside the store where product is displayed for sale."

With respect to distribution, associates are still prohibited from distributing flyers, brochures, and other written or printed material during their work time and during the work time of the associate being offered such materials, and in any work areas at any time. The rule now defines work areas to include the parking lot and sidewalk outside the store, but not outside break areas. With respect to outside break areas, the record evidences that although stores frequently have benches outside the store for the employees to take a break at, employees are allowed to take a break anywhere they wish outside the store.

With respect to off-duty employees the amended rule provides that "[o]ff duty associates are welcome as customers at any time but may not solicit customers or nonassociates." Furthermore, "at the store where they work, [associates] may only engage in solicitation or distribution in accordance with this policy and the Company policy on solicitation by charitable or civic organizations." The amended rule also specifically prohibits off duty employees from one store soliciting employees at another store, except to the extent such solicitation is in accordance with Respondent's policy of permitting civic and charitable organizations to solicit. In the testimony Nadworny gave prior to the issuance of this amended rule, he repeatedly stated that an employee from one store coming to another store would be treated as any other non-employee member of the public and, as such, would not be allowed to solicit the employees of the store he was visiting except to the extent the solicitation fell within the parameters of the rules pertaining to charitable or civic solicitation. Finally, the rule as amended, now states: All solicitation and distribution must respect the right of any associate who does not wish to solicited and no associate may harass, inconvenience or pursue another associate who has asked not to be solicited.

The manner in which Respondent applies and enforces its various solicitation/distribution policies to employees and non-employees is discussed below.

E. Solicitation by Respondent's Employees

In support of the UFCW organizing efforts, seven off-duty employees of Respondent's unionized stores (so-called off site employees) went to Respondent's unorganized locations in an effort to solicit the employees working at those stores. These unionized employees visited a total of nine stores over two days in December 2001, and one day in February 2002. At eight of the unorganized stores that the off site employees visited, they were asked to leave by Respondent, even though the employees involved remained outside of the store, identified themselves as Respondent's employees, and said that they were there only to speak to the onsite employees about the benefits of unionization. On most occasions when off site employees refused to leave at Respondent's request, Respondent contacted the police to have the employees ejected as trespassers.

Five of the seven offsite employees testified at the hearing – William Johnson, Donald Berger, Doug Simmons, Wilma Erchull, and Michael Langis. Johnson, who works in the North Fall River store went to the Shaw's in Cedarville/Plymouth and the Star in Marshfield with co-worker Carlos Ferreira, who worked in a Rhode Island store, on December 10, 2001. Tr. 150.[17] On December 11, 2001, Donald Berger, who works in the Cohasset store, and Doug Simmons, who works in the Fairhaven store, went to the Star stores located in Orleans and Harwich with co-worker Steve Carrera, who works in a Rhode Island store.[18] On February 6, 2001, Wilma Erchull, who works in the Cohasset store and Michael Langis, who works in the Dartmouth store, went to five stores located in Greater Boston - the Morrissey Boulevard/Dorchester Star, the Hyde Park Star, the West Roxbury Star (which was being rebadged as a Shaw's), the Brookline Star, and the Mt. Auburn Street/Cambridge Star stores. The Cedarville, Marshfield, Orleans, and Harwich stores are located within the geographic area covered by the collective bargaining contract Respondent has with Local 791. Each of the above employees testified at the hearing that they have worked for the Respondent for many years and each has worked more than one of Respondent's unionized store.[19] All of these employees volunteered to participate in the campaign. Although all of these employees, except Erchull, held a steward's position when they visited an unorganized store for which they receive a monthly stipend, all of them, including Erchull, volunteered their time and were not paid by the UFCW for their services.[20] The UFCW picked the stores that these employees visited but nonemployees UFCW representatives were not with them when they attempted to solicit and distribute union literature to the onsite employees.

In addition, nonemployee representatives of the UFCW, Robert McClay on December 10 and 11, 2001 and Patrick and Michael Connors on February 6, provided the employees with some material to distribute and instructions on how to conduct themselves. In this regard, the employees were provided with a tri-fold document, which included an authorization card, to give to employees who expressed interest in the Union. They were also given a memorandum to provide to local store management if they were questioned about what they were doing, and correspondence to provide to the police if they were called to the scene. The document that the employees were to provide to the store managers specifically states that they are employees of Respondent and identifies them as employees working in Respondent's other stores who were

[17] As of December 10, 2001, Respondent had terminated Ferreira. The Union filed a grievance over that termination which was pending at the time of the trial in this matter.

[18] Berger holds the position of Bakery Manager in the Cohassett store. At the trial, Respondent argued that, as a bakery manager, Berger, despite having been a bargaining unit member and an alternate steward for the last four years, was a statutory supervisor and, therefore, not entitled to solicit outside Respondent's stores. Respondent offered performance evaluations and work schedules prepared by Berger. Respondent also offered an arbitration award concerning the discharge of a general duty clerk in the deli department of its North Quincy, Massachusetts store. The mere fact that Berger may evaluate employee job performance without any showing that such appraisal affects an employee's terms and conditions of employment does establish that Berger is a supervisor. Harborside Healthcare, Inc., 330 NLRB 1334 (2000). Similarly, the mere fact that Berger may write up a schedule, absent any evidence that he is exercising independent judgment in doing so, does not establish that Berger is a statutory supervisor. Finally, although received into evidence, an arbitration award concerning the discharge of an employee in another store working in a different department than Berger is not a sufficient basis on which to find the presence of supervisory status.

[19] Employees can be transferred from one union store to another within limits and maintain their wages and benefits. Nonunion employees also maintain their wages and benefits if they transfer between nonunion stores. Employees are also allowed to transfer from a union store to a nonunion store.

[20] In addition to holding a steward's position, from January 2001 to January 2002, Langis took a leave of absence from Respondent to work with the Union. During that time, Langis worked for and was paid by the Union and took directions from McClay. When he completed his leave of absence in January 2002, Langis returned to work for Respondent in the Dartmouth store. Langis was also elected by the membership to serve as a delegate at the Union's convention that took place in San Francisco in July 2003.

then on their own time. The document further states that their purpose in being there was only to speak to employees of the store, during their nonworking time, in common areas, about unionizing. Similarly, the correspondence that the employees were to give to the police explains that representatives of the Union would be speaking to Respondent's employees in the parking lots and other common areas near the store about the benefits of unionizing. The document further explains that many of the Union members are themselves employees of Respondent who work in other stores and who are there to speak to their fellow employees about the mutual benefit of union representation. The employees were also instructed that they were to speak only to employees on break and not bother anyone who was working. Finally, the employees were told not to leave the premises if asked to do so by the manager but only if instructed to do so by law enforcement officials.

What follows are the events that transpired at each of the unorganized stores that the employees visited.

1. December 10, 2001

a. Cedarville

1) The employees' attempts to solicit

When Johnson and Ferriera arrived at the Cedarville store, they went to an area located on the sidewalk between the store and the parking lot, by the far entrance, where there were benches and a trash container that had a cigarette ash tray on top. Based on his years of experience working for Respondent, Johnson identified the area as a place where employees would take breaks and/or have a cigarette.[21] From this location, Johnson and Ferreira waited for employees to come out to speak to them about the Union. McClay remained in his vehicle in the parking lot outside the store, where he took photographs. While Johnson and Ferreira were outside the Cedarville store, they spoke to three or four employees who had come out of the store for a break. In speaking with these employees, Johnson testified that he would introduce himself, stating that he worked for Shaw's Supermarkets at another location where he was a Union steward, and would offer them a copy of GC Exh. 13, asking them to read it on their own time. Johnson was wearing his Shaw's Supermarket shirt under his jacket. Although he did not have his name tag on, he did keep the jacket open to allow his shirt to be seen.

After about ten minutes, an individual came out of the store who introduced himself as the assistant store manager. Johnson recalled that the individual's name began with the letter Z. Based on Respondent's answer to the Third Amended Consolidated Complaint (paragraphs 6 and 14), it appears that Mr. Z is, in fact, Michael Zajko, assistant store manager for the Cedarville Store. Johnson testified that Zajko had a letter that he wanted them to read, at which point Johnson gave Zajko a copy of General Counsel's Exhibit 16, which Zajko took. Zajko then said that Johnson and Ferreira were not allowed there, that they should not be there, and that he would have to call the police if they did not leave. Zajko further stated that Respondent did not want them there, that they were not allowed on the property, and that Respondent did not want Union representatives on the property. Zajko did not identify any location where they would be allowed to remain. Johnson and Ferreira told Zajko that that they, too, worked for Respondent, that they were not doing anything that they just wanted to talk to people who were

[21] In fact, Respondent's witness, Evan Dobratz, who worked in the Cedarville store at the time as the assistant grocery manager, confirmed that the bench area was where employees took a break, referring to the bench as the "smoking bench."

on break.[22] When Zajko told them he would have to call the police if they did not leave, Johnson responded that Zajko should do what he had to do. At that point, Zajko left and Assistant Grocery Manager Evan Dobratz called the police. Shortly after that, a police officer arrived and walked into the store, and then a second police officer, whom Johnson identified as a supervisor, arrived. Johnson testified that the first police officer then came out of the store and told the two off site employees that they were not allowed to be there, that Respondent did not want them there, and then he asked them to leave. The officer took their names and addresses and said that if they did not leave they would be arrested. Johnson provided the officer with a copy of General Counsel's Exhibit 17 and then he and Ferreira left. The officer did not identify any location where Johnson and Ferreira could remain.

2) Respondent alleges Johnson entered the store

Respondent contends that Johnson actually entered the Cedarville store when he was asked to leave by Respondent. Johnson, however, testified that he did not enter either the Cedarville or Marshfield stores on December 10, 2001, and it is submitted that his testimony in that regard should be credited over that of Evan Dobratz, who Respondent called in an attempt to show that Johnson was in the Cedarville store when he was asked to leave. Dobratz is currently an assistant store manager trainee at Respondent's Norwood store. At the time of his testimony in this matter, he had occupied that position for about a month. Prior to that time, Dobratz was employed in the Cedarville store. Dobratz worked in that store for about 10 years, the last three of which he held the position of assistant grocery manager. This is the position that Dobratz held on December 10, 2001. Dobratz testified that during the period from July to December 2001, he had encountered Union representatives inside the Cedarville store. He was able to recall four specific occasions when he encountered Union representatives in the store. He testified that on each occasion an employee brought to his attention the fact that there were two Union representatives in the store. Although he did not personally observe them engaged in any solicitation in the store, on each occasion he confronted the solicitors and asked them to leave.[23] On each of these occasions, they initially refused his request and, as a result, Dobratz contacted the police. On the first three occasions, the Union representatives left before the police arrived. On the fourth occasion, however, the police arrived before the Union representatives left.

Dobratz testified that this fourth occasion occurred on December 10, 2001, the same day that Johnson testified that he was at the store. Dobratz testified that sometime between 8:00 a.m. and 9:00 a.m. that morning, an employee named Matt Kearney, who was working in the dairy department, had advised Dobratz that he had received a leaflet from two individuals in the store. Dobratz could not specifically recall the information contained in the leaflet, although he believed it involved a comparison of benefits offered to represented and unrepresented employees of Respondent.[24] Dobratz testified that he and Kearney encountered the two Union

[22] Respondent offered the testimony of Rosemary Slamon, its payroll supervisor, to suggest that it would not be possible for it to check the bona fides of someone coming onto Respondent's store property asserting that they were one of Respondent's employees. Slamon testified that Respondent employed some 27,000 employees at the time she testified. She also asserted that Respondent experiences a large turnover and that there were 4 active employees named William Johnson and 9 inactive employees named William Johnson in the Respondent's payroll system. Slamon did not offer any testimony, and there is no record evidence to suggest, that at the time the solicitations took place Respondent attempted to and was unable to verify the employee status of any of the individuals involved in the incidents of solicitation discussed herein.

[23] Based on Dobratz's personal observations of the Union representatives in the store, it appears they were acting no differently than any other customer would act.

[24] In this regard, Dobratz testified that the leaflet contained information concerning Respondent's leave benefits (TOPP time) and/or health benefits, comparing them with those benefits offered to Respondent's represented

Continued

representatives in the produce area of the store. On the way, Dobratz and Kearney encountered a produce employee, Dan Gibbons, who said he, too, had received one of the leaflets.[25] Dobratz testified that one of the two Union representatives was wearing a jacket that was embroidered with the Union logo on the front and the name "Bill" on the sleeve. The other Union representative was not wearing anything that identified him as being a supporter of the Union. Dobratz stated that he had not previously seen either of these two individuals in the store prior to this time.

Dobratz testified that when he approached the two Union representatives, Kearney and Gibbons remained in the area, within five feet of the exchange, so they could observe what transpired. Neither were called to testify about what they heard or observed. In any event, Dobratz testified that when he approached the two Union representatives, he greeted them with a "good morning," and asked them how they were and who they were. They replied that they were great, but refused to give their names. Dobratz then told them if they did not leave he would call the "cops." According to Dobratz, the Union representatives welcomed that, replying "Go ahead, we're not going anywhere, we have every right to be here, we work for Shaw's." Dobratz asked them where they worked, but he testified that they refused to tell him. According to Dobratz, they said they had documentation allowing them to be there, but they refused to show it to Dobratz when he asked. Dobratz then testified that he called the police and that the three of them waited inside the store for the police to arrive. It took about 15 to 20 minutes for the police to arrive. Thus, according to Dobratz's testimony, the police would have been at the store at the very latest, about 9:20 a.m.

When a police officer arrived, Dobratz and the two Union representatives proceeded outside the store to meet him. The police officer initially spoke to Dobratz, who said that he had asked the two individuals to leave, that they did not want to, and that he was requesting the police to ask them to leave. The police officer then spoke to the two Union representatives privately to get their side of the story. The officer then called for assistance. A patrol supervisor then arrived, speaking first to the other police officer and then speaking to the two individuals. Dobratz states that as that was happening, Mike Zajko, the assistant store manager, arrived. Zajko's hours vary. According to Dobratz, Zajko would generally arrive to work between 8:30 a.m. and 10:00 a.m. When Zajko arrived, he asked Dobratz what was going on and Dobratz reported what had transpired. The patrol supervisor then spoke to Zajko and Dobratz to advise them that the two individuals would leave, which they did.

Respondent attempted to corroborate Dobratz's testimony by offering the police report concerning the events of December 10, 2001. Rather than corroborating the testimony of Dobratz, however, the police report actually contradicts his testimony and fully corroborates Johnson's testimony as to what transpired on that date. The report states that the police were called to the store at 10:54 a.m. arriving at 11:04 a.m. – some 1.5 hours after Dobratz recalled the events occurring. The report also states that when the police officer arrived, he was met by Zajko (not Dobratz), who reported that two Union members were "outside the store speaking with store employees concerning the union and handing out union literature." The report goes on to state that "Mr. Zajko stated that the store is non-union and management does not want union members on the property."

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employees.

[25] On direct examination, Dobratz testified that it was a produce employee, presumably referring to Gibbons, who had initially brought the Union representatives to his attention. It was on cross-examination that Dobratz identified Kearney as the employee who told him of the Union representatives being in the store and he was not entirely sure if Gibbons had even received any material from them on this occasion.

Following Dobratz's testimony, Johnson retook the witness stand wearing the jacket that he wore outside the Cedarville store on December 10, 2001. The jacket did not have any Union insignia on it, nor did it have his name embroidered on it. The only thing embroidered on the jacket was an Olympic symbol with the letters "USA" appearing on the left front breast area of the jacket.

It is apparent from the record evidence that Dobratz is confusing what transpired on December 10, 2001, with an incident that occurred on February 27, 2002. At that time, the Union was distributing a handbill about Respondent's leave benefits, a.k.a. Topp Time. On February 27, 2002, Patrick Connors and Union organizer John Franzen went to the Cedarville store to speak to the store employees about the Union and distribute the Topp Time leaflet to them as they reported for work. Connors and Franzen arrived at the store at approximately 6:00 a.m. They stationed themselves outside one of the entrances in the parking lot. Connors and Franzen were able speak with one employee before a department manager came out and told them they had to leave. Connors and Franzen asked the department manager if he was the acting store manager or if the store manager or assistant store manager were there. The department manager said "no," to which Connors and Franzen replied that they would not leave. The department manager advised them that he would call the police and the police did, in fact, arrive after about 15 minutes. Connors states that the two officers first went into the store and then came out and advised him and Franzen that they could remain where they were, provided that they did not speak to anyone who did not want to speak to them and that they stayed out of the way of customers coming into the store. The police report corroborates Connors' testimony and identifies Dobratz as the department manager to whom Connors and Franzen spoke that morning.

Connors testified that about one-half hour after that, the assistant store manager arrived and asked Connors and Franzen why they were there. Connors and Franzen explained how the police had already been called and were allowing them to be there. The assistant store manager went inside the store, and after about 15 minutes, two police officers arrived. The officers first went into the store and then came out and told Connors and Franzen that they would have to move to a location by the public sidewalk and the parking lot entrance, where they remained until lunch. Again, Connors' testimony is corroborated by the police report, which identifies the assistant store manager as Zajko.

Connors further recalled that Franzen returned to the sidewalk area, where they were joined by McClay and another organizer, John Farley. Connors states that as they attempted to distribute the TOPP Time leaflets to employees as they came in and out of work, two individuals stopped and asked if there was a strike or labor dispute. One was a member of the IBEW, and the other was a member of the Teamsters. Connors states that after they were told what was happening, the two union members offered to take the leaflets into the store. Connors recalled that they said they were going into the store to visit the Citizen's Bank located within the store. Connors testified that the two individuals came out of the store and told the UFCW representatives that they had attempted to distribute the leaflets, but that they were asked to leave.[26] Shortly thereafter, the assistant store manager came out calling Connors and the others losers. The assistant store manager then returned to the store and the Plymouth police came to the scene yet again. The police spoke to them about precisely where they could be in relation to the store. The police also advised them that a detail officer would remain on the

[26] Dobratz testified that there was an occasion when customers brought to his attention Union leaflets that were left on the bank podium inside the store. It appears from that testimony that Dobratz believed that may have occurred that same day he encountered Shaw's employees inside the store.

scene.[27] Again, the police report for this incident corroborates Connors' testimony, noting that when the incident was reported, Zajko had identified that "unknown union representatives were seen inside the store also handing out pamphlets."

b. Marshfield

After leaving the Cedarville store, Johnson and Ferreira went to the Star Market located in Marshfield, Massachusetts. They arrived around noon time and went to an area outside the store that Johnson identified as the break area. As was the case at the Cedarville store, there were a bench, ashtrays, and a telephone in the area. McClay accompanied Johnson and Ferreira to Marshfield, but he remained in his vehicle parked in the lot outside the store.

Johnson testified that shortly after they arrived, a gentleman wearing a Star shirt got out of his car and appeared to be going into work. As this individual walked toward them, Ferreira gave him a copy of General Counsel Exhibit 13 and asked him to take a look at it when he had a chance. The individual proceeded to go into the store and, shortly after that, another individual came out of the store who identified himself as the assistant store manager. Based on Respondent's answer to the Third Amended Consolidated Complaint, (paragraphs 6 and 16), it appears that the assistant store manager was Brian Schwade. Schwade told Johnson and Ferreira that they were not wanted there. Schwade had two letters, one from Respondent and one from the landlord, and he stated that neither Respondent nor the landlord wanted them there. Schwade then told them that they had to leave or he would call the police. Johnson told him to do what he had to do. Johnson also offered the assistant store manager a copy of General Counsel Exhibit 16, and, although Schwade initially refused to accept it, he eventually took the document. After Johnson told Schwade to do what he had to, Schwade went into the store, called the police, and then came back outside and stood with Johnson and Ferriera. Johnson testified that he spoke briefly with Schwade about how long he and Schwade worked for Respondent. At no time did Schwade identify a place where Johnson and Ferriera could remain. A police officer did arrive, at which time Johnson gave him a copy of General Counsel Exhibit 17. The officer stated he was not sure of the laws and asked Johnson and Ferreira to follow him to the police station to speak with the supervisor. McClay, Johnson, and Ferriera then followed the officer to the station where they spoke to the desk sergeant. That officer advised them that Respondent had a letter, and the landlord had a letter, and that they should not go back to the store, and if they did, they would be arrested for trespassing. The officer stated that they had come in through the front door that they did want not to go out the back door.

2. December 11, 2001

On December 11, 2001, three Shaw's employees, Donald Berger, Doug Simmons, and Steve Carreira, visited two of Respondent's Star Markets stores, one in Orleans, Massachusetts, and one in Harwich, Massachusetts.

a. Orleans

The Orleans store is part of a larger shopping plaza. When Berger, Simmons and Carreira arrived at the Orleans store they went to an area at the left entrance of the store on the

[27] Although not within earshot of this discussion, Connors observed employees, the assistant store manager, and the department manager outside the front entrance to the store while the police were there. Connors also testified that the assistant store manager was taking photographs.

sidewalk located between the entrance and the parking lot. Simmons explained that the reason they chose to go to that area was that it appeared to be a break area because there were vending machines and a bench there. Simmons also recalled that there were holiday wreaths for purchase displayed outside the store.[28] Berger estimated that they stood about 10 or 15 feet away from the store entrance, while Simmons believed they were some 30 feet away. Berger, Simmons, and Carreira remained in that area for about 20-25 minutes before two employees came out. As the two employees approached, Simmons introduced himself as a Shaw's employee and member of Local 791, saying he wanted to talk to them about the benefits of being in the Union. One of the two, who Simmons believed to be a meat cutter, replied that he was on break and wasn't interested, and the two continued on their way to the bench around the corner of the building. Berger, Simmons, and Carreira did not pursue them further at that point. Shortly thereafter, the two employees passed by them on their way back to the store, at which time Simmons told them he would be there the remainder of the day if anyone was interested in talking to them about the Union. About 15 minutes later, another employee came out and Berger, Simmons, and Carreira introduced themselves as Shaw's employees, identifying the stores that they worked at, and saying they were there to try and organize the store. The employee who had come out of the store was wearing his name tag on his jacket, which identified his name and the department of which he was the manager. This employee's name was Bob Gogan. Gogan was wearing a name tag that identified him as a GM Manager. They spoke about their jobs and the similarities between working for Shaw's and Star. Berger, Simmons, and Carreira offered Gogan an authorization card and he took it. According to Simmons, as they were speaking, a woman came out of the store and introduced herself as the store manager, Laurie Sances. Sances told Berger, Simmons, and Carreira they had to leave, saying that they were trespassing and that she had a notice saying that they were trespassing. Simmons testified that he told Sances who they were, that they were Shaw's employees, members of Local 791 there to organize the Star Market employees. Simmons further stated that he was expecting her to come out at some point in time and ask them to leave, but that they were not going to do so. Sances responded that if they did not leave, she would call the police. Simmons replied that he expected her to say that and he had to politely say that they would not leave. According to Simmons, at that point Sances and Gogan, the employee they were talking to, went into the store, with Gogan handing the authorization card back to Berger, Simmons, and Carreira.[29] Simmons testified that after a few minutes, Sances returned with a document, again saying that they were trespassing and, at that point, Simmons offered her a copy of General Counsel's Exhibit 16.[30] Sances again said that if they did not leave, she would call the police, and again Simmons replied that he expected her to say that, that he preferred she did not call the police, but that she should do what she had to as store manager. At that point, Sances returned to the store, called the police and, within about 5 minutes, a police officer came to the scene.

Simmons testified that when the police arrived, Sances came out of the store. The officer first spoke to Sances and then spoke to the three employees. According to Simmons, while the officer was speaking to Sances, she handed him a document that appeared to be the same one she had been carrying when she spoke to Simmons. After speaking with Sances, the officer spoke to the three employees, asking if they knew they were trespassing. Simmons introduced himself, saying he was a Shaw's employee and a member of Local 791 there to organize Star Market employees. Simmons said he believed they had a right to be there and

[28] It is not unusual for Respondent to have seasonal merchandise for sale displayed outside its stores.

[29] Berger recalled that Gogan returned to the store with the authorization card before the store manager came out.

[30] Berger recalled that both General Counsel's Exhibits 16 and 17 were offered to Sances to explain why they believed they had a right to be there.

offered the officer General Counsel's Exhibit 16. The officer said that he did not want to get into the middle of anything, that he was there to enforce a no trespass notice, and he asked the employees why they did not leave when asked. Again Simmons replied that they thought they had a right to be there and at that point the officer asked them to leave, which they did.[31] At no time did Sances or the officer advise the employees of a location at which they could solicit.

b. Harwich

The Harwich store is also located in a shopping plaza. As was the case in Orleans, Berger, Simmons, and Carreira went to an area to the left of the store entrance on the sidewalk between the parking lot and the store, while McClay and Ferreira parked at a nearby bank. Simmons recalled that to the left of the entrance there was a bench and an ashtray, so it appeared to him to be the area where employees would take a break. They waited for employees to come out in front of a vacant building that was to the left of the bench. A long period of time passed before they even saw an employee outside the store. This employee was out in the parking lot of the store. According to Berger, they initially saw an employee wearing a blue Star market shirt come out of the store. Berger testified that it appeared that the employee was leaving his shift. Berger recalled that either Carreira or Simmons approached the employee, and gave him a leaflet (GC Exh. 13). The exchange took a matter of seconds. Berger testified that it turned out the employee was not leaving, but rather, was there to collect shopping carts. After collecting a few carts, the employee returned to the store.

Simmons testified that they initially saw this employee in the parking lot collecting carts and they decided to approach him with a leaflet because they had not seen any other employees. Simmons then approached the employee, introduced himself, and gave him General Counsel's Exhibit 13, asking the employee to take the authorization card inside and tell anyone else that if they were interested in speaking to them, to come outside. The employee continued working for another 5-10 minutes and then returned to the store.

A few minutes later, another individual, Jessie Fleck, came out of the store. According to Simmons, Fleck was wearing a name tag that identified him as a GM Manager. Berger recalled that Fleck was a grocery manager. When Fleck came out of the store, he advised Berger, Simmons, and Carreira that he was in charge of the store. They had a brief exchange about their jobs since they worked for the same company, and Fleck was given a copy of General Counsel's Exhibit 10 (the authorization card). Fleck told Berger, Simmons, and Carreira that they were trespassing and that they had to leave the premises. They explained to Fleck that they thought they had a right to be there, that they were just there to talk to employees who came out on break, and that they did not intend to go into the store to bother anyone. They also gave Fleck the letters they had for store managers (GC Exh. 16) and the letter for the police (GC Exh. 17). Fleck responded that they could not stay there, that he needed them to leave the property, and that if they did not leave he would have to call the police. Berger, Simmons, and Carreira said that they would not leave, at which point Fleck returned to the store and called the police.

Shortly thereafter, several police cruisers and the Harwich chief of police arrived at the

[31] Berger's recollection of the exchange is essentially the same. Berger testified they told the officer that they were there trying to organize the store and leaflet the employees. The officer replied that he was sympathetic to their cause, that his friend had recently lost his job at the Shaw's West Bridgewater warehouse, that he was not there to interpret the law that he was there because they were trespassing. Berger stated that they handed the officer both General Counsel's Exhibits 16 and 17, that the officer glanced at them saying that he was not there to interpret the law, that the manager had asked that they be removed, and that they had to leave or be arrested.

scene. According to Simmons, the police first spoke to Fleck, and then spoke to Berger, Simmons and Carreira. The police officers asked why they were there and if they knew they were trespassing. Simmons replied that they were Shaw's employees on an organizing drive trying to get cards signed. Berger recalled that the officers were given copies of the authorization card (GC Exh. 13), the store manager letter (GC Exh. 16), and the police letter (GC Exh. 17). The officers asked why they were there if they had previously been asked to leave, apparently referring to the fact the Union had been to the store previously. Simmons tried to explain that he had not been there before. When the police chief arrived, he advised the three employees that he was aware there was an organizing campaign taking place on the Cape. He described how he had received letters from Respondent and the Union, how he had spoken to the police chiefs of other towns on the Cape, and to the Town Counsel. He advised Berger, Simmons, and Carreira that they were trespassing and he would leave it up to Fleck as to whether they would be arrested. After speaking to Fleck, the Chief told them to leave. According to Simmons, the chief appeared to direct his comments to him when he said if any of the three of them were found on any Shaw's property over the Bourne Bridge (i.e. on Cape Cod), they would be subject to arrest.[32] Berger, Simmons, and Carreira then left.

Neither Fleck nor the police advised Berger, Simmons, and Carreira of any location at which they could solicit. In their conversation with Fleck, Fleck made no mention of the fact that they had spoken to an employee while that employee was working. From where Berger, Simmons, and Carreira positioned themselves outside the store, they did not impede anyone's ability to enter or exit the store.

On December 12, 2001, Berger had a conversation about the events of December 11 with then District Manager Hank Wolfson. This conversation occurred in Respondent's Cohasset store while Berger was at work. As Berger testified, he was coming out of the rest room getting ready to leave for the day when he encountered Wolfson. Wolfson greeted Berger and said that he had heard that Berger had been visiting some of their (meaning Respondent's) Star locations on the Cape. Berger acknowledged he had spent his day off doing so.

3. February 6, 2002

On February 6, 2002, employees, Wilma Erchull and Michael Langis, visited five stores located in and around the City of Boston.

a. Morrissey Blvd. Dorchester

The first store that Langis and Erchull went to was a Star Market located on Morrissey Boulevard, in Dorchester, Massachusetts. When they arrived, Erchull and Langis positioned themselves in what appeared to be the employee break area, as there were benches and a pail for cigarettes in this area. In fact, she recalled that there were employees there at the time they arrived.[33] In speaking to the employees, Erchull and Langis introduced themselves by name, saying that they were Shaw's employees there to talk about the benefits of being unionized. Langis, who was wearing his Shaw's name tag on his jacket, testified that he also said that they worked in a unionized store. Erchull had worked the night before and she was still in her work

[32] The Bourne Bridge is one of only two ways to access Cape Cod by automobile.

[33] Langis testified that he and Erchull stood nearer to the entrance of the store waiting for employees to come out of the store. If an employee came out and walked over to the benches, Erchull and Langis would approach the employee there. It appears from his testimony, however, that not all of the employees that came out on break walked over to the benches. Langis testified that the only person they spoke to in front of the store entrance was the produce manager, Jim, who, as discussed infra, asked them to leave.

clothes, including a Shaw's shirt and name tag, which she states were visible through her open jacket.

While Erchull and Langis were at the store, a produce manager named Jim identified himself as being in charge of the store that day. According to Erchull, Jim asked why she and Langis were there and they started to explain why they were there, offering him the document they had for store managers to explain why they were there (GC Exh. 16). Jim refused the document, saying that they had to leave. Erchull and Langis replied that they felt they had a right to be there to talk with their fellow workers, that they were not interfering with their work. Jim replied that he would have to make a call.[34] Thereafter, people stopped coming out of the store, and they left.[35]

b. Hyde Park

At the Hyde Park store, Langis and Erchull tried to speak to several people on break, but received little interest. Langis testified that these employees would come out of the store and lean against the building, and that was where he and Erchull would speak to them.[36] After about 15-20 minutes, an individual who identified himself as the assistant store manager came out and said that they could not be there and had to leave. In its Answer to the Third Amended Consolidated Complaint, Respondent identified this assistant manager as Anthony Rapoza (GC Exh. 1(ll)). As they had done at the Morrissey Boulevard store, Erchull and Langis tried to explain who they were and why they were there, offering Rapoza a copy of General Counsel Exhibit 16, but Rapoza was not interested. Erchull and Langis told Rapoza that they would not leave and Rapoza said that they had to leave, they were on private property, and he would have to call the police. Rapoza then went back into the store.[37] At that point, employees stopped coming out of the store and, after a little while, Erchull and Langis left without an encounter with the police.

c. West Roxbury

When they arrived at West Roxbury, Erchull recalled that she and Langis were dropped off on the street and that they walked the length of the parking lot to the store looking for the break area as they approached. Erchull testified that they concluded the break area was by the left entrance where she observed a picnic table and a pail for cigarettes. Erchull testified that they were able to speak to a few employees outside the store before being approached by an individual who identified himself as Frank Gillis, an assistant store manager. Erchull testified that Gillis asked them to move away from the doors which, she states, they did, as they were

[34] Langis' version of the exchange with Jim corroborates Erchull's. Langis states that when Jim came out he said that they could not be there, that they had to back away from the doors. Other than asking them to back away from the doors, Jim did not suggest a location that they could remain at and solicit uninterrupted. At that point, Erchull and Langis said that they would not leave and Jim replied that he would have to call it in. Langis recalled several police officers going into and coming out of the store, but none stopped to speak with them.

[35] Respondent's Exhibits 22, 24, 25, 26, and 27, are photographs taken by Michael and Patrick Connors of Erchull and Langis, which show Erchull and Langis outside the Morrisey Boulevard store. Most of these pictures (R. Exhs. 22, 24 and 26), show Erchull and Langis off to the side of the entrance, not obstructing or interfering with anyone's ability to pass, enter or exit the store, just as they testified. In the photographs where they are standing in front of the entrance, they were speaking to the manager, Jim, who chose to speak to them there. R. Exhs. 25 and 27.

[36] Langis also recalled that for a minute or two he spoke to an employee who was loading a van parked by the curb to the side of the front entrance to the store. Langis offered the employee an authorization card (GC Exh. 13) which she accepted.

[37] Langis testified that Rapoza made no mention of Langis' conversation with the person loading the truck when Rapoza asked he and Erchull to leave.

not there to interfere with the flow of business and the area was congested with a workman and sign equipment. Erchull further recalled that Gillis came out of the store again with another individual who identified himself as an assistant store manager. Respondent's Answer to the Third Amended Consolidated Complaint identified this individual as Mike Hanrahan. At that point, Hanrahan told Erchull and Langis that they were not allowed on the property and that the police would be called if they did not move. Erchull testified that they tried to explain who they were and why they were there, again offering the managers General Counsel's Exhibit 16, stating that they believed they had a right to be there to speak to their fellow employees about the Union. During this conversation, Erchull recalled that Hanrahan asked if she had come onto the property in a white van. Erchull replied that she had not come onto the property in a white van that she had walked onto the property. Hanrahan walked over to the van and came back asking why she was lying to them and she said she was not lying. Erchull explained that she responded to Harahan's questions the way she had because she considered her presence there as an individual that worked for Shaw's and as a Union member there to speak with fellow employees.[38]

When Hanrahan asked Erchull and Langis to leave, they did not. Hanrahan and Gillis then went back into the store and called the police, who arrived shortly thereafter. A police officer first went into the store and then came out and told Erchull and Langis that they had to leave. Erchull and Langis gave the officer a copy of the letter for the police chief (GC Exh. 17), and left as requested.[39] Gillis, Hanrahan, and the police did not advise Langis and Erchull of any location outside of the store where they would be allowed to solicit.[40]

d. Brookline

At the Brookline Star Market, Erchull and Langis stood outside the store on the sidewalk by the entry way. The entrance was at the corner of the building, and the sidewalk they were on followed a road down the side of the building that Erchull and Langis thought was a public road. While they were outside, Erchull and Langis introduced themselves to a couple of employees who had poked their heads outside, but were not interested in talking to them. There was also an employee outside the entry way collecting carriages who began treating the ice on the sidewalk after someone had slipped and fallen. While the employee was working, the three employees said "hi" to each other and the employee asked Erchull and Langis what they were doing there. Erchull told him that she worked for Shaw's in a Union store and that she was there to give information to anyone that was interested. As the employee moved down the

[38] Langis also recalled Hanrahan asking if he and Erchull were with the people in a white van (Patrick and Michael Connors). Langis recalled telling them they were not and candidly admitted that his response to the question was not truthful.

[39] Langis' version of what transpired at West Roxbury, although somewhat different, largely corroborates Erchull's. Langis recalled that he and Erchull were dropped off in the parking lot of the store and proceeded to the left entrance, where they remained only for a short while, because no employees were coming out. Langis recalled that they then went to the right entrance where they were able to speak with some employees out on break. While they were there, Gillis and Hanrahan came out and told them they were on private property and could not be there. Langis recalled explaining to them that they were from Union stores there to talk to the employees about the benefits of joining the Union. Gillis and Hanrahan replied that it did not matter, that they were on private property and would have to leave, and if they did not leave the police would be called. Langis also testified that Gillis and Hanrahan spotted the white van and Patrick and Michael Connors and asked if Erchull and Langis were with them. . Langis denied being with Patrick and Michael Connors. Gillis and Hanrahan then walked around the van, then came back asking why they had to lie to each other, and then proceeded into the store. When the police arrived, the officer first went into the store and then came out saying that Erchull and Langis were on private property and would have to leave. Langis recalled offering the officer a copy of the police chief letter (GC Exh. 17) and then leaving.

[40] The officer did, however, tell Erchull and Langis that if they wanted to return to the store in the future they should first go to the police station or community to find out where they could be.

sidewalk, Langis went with him. Langis told him who he was and that he was there to talk to him about joining the Union, but, according to Langis, the employee was not interested.[41] As Langis was talking to the employee who was working, an individual came out of the store and spoke to Erchull. Erchull testified that this individual identified himself as being in charge of the store. The pleadings identify this person as Dan Barry, the manager of the Brookline store. Barry told Erchull that they had to leave. Erchull testified that they told Barry that they felt they had a right to be there, that they were not there to cause any inconvenience to the customers, and that they just wanted to speak to their fellow workers while they were on break. Barry insisted that they could not be there and that they would have to leave or he would call the police. Barry then returned to the store and called the police. Barry made no mention of the fact that Erchull and Langis had been speaking to an employee while he was working, nor did he suggest that if they moved to a different area they could remain. In explaining why they were there, Erchull offered Barry a copy of the letter she had for store managers (GC Exh. 16), but he refused it. When Langis saw Erchull having this conversation, he walked over to her and asked what had happened and she recalled the conversation for him. The police arrived shortly thereafter. When the police arrived, they went into the store, then came out and told Erchull and Langis that they were on private property and had to leave. Erchull and Langis explained that they were Shaw's employees, that they worked for the same company, and that they were there to talk to the employees about the benefits of the Union. The officer said that it did not matter, that they were on private property. They pointed out to the officer that they thought they were on a public sidewalk. The officer advised them that they were on a private way, and directed them to the public sidewalk. Respondent's Exhibit 30 shows the officer escorting Erchull and Langis to the public street. The public sidewalk was removed from any foot traffic around the store and, as Erchull described it, they had no one to speak to there but themselves, so they left.

e. Mt. Auburn Street, Cambridge

At this store, although there was an entrance to the store on Mt. Auburn Street, Erchull and Langis went to an entrance located on the side of the building in the area of the parking lot. They chose that entrance because there were benches in the area and several employees there who appeared to be on break, whereas the entrance on Mt. Auburn Street appeared to be primarily used by customers.

When Langis and Erchull arrived at the store, there was a young girl outside the entrance selling candy as a school fundraiser. Erchull purchased three candy bars, one each for her, Langis, and the young girl. Erchull and Langis also spoke to several employees who were outside on break. While they were there, two individuals came out of the store who identified themselves as managers. In its Answer to the Third Amended Consolidated Complaint, Respondent identified one of these managers as Mike Risitano. GC Exh. 1(ll). The managers approached the young girl and asked her if she had permission from the store manager to be there, and she replied that she did not have permission. They then told the young girl she would have to leave, and that if she wanted to be there in the future she would first have to obtain the store manager's permission. According to Erchull, the girl then went into the store. Langis recalled that the girl walked away out of the parking lot when she was asked to leave.

[41] Langis testified that he went up to speak to this individual even though he was working because he did not think he would be interrupting the employee's work.

Risitano and the other manager then walked into the parking lot as if they were looking for something, and then walked to where Erchull and Langis were and stood about 5 feet behind them, talking to each other for a while. They then asked Erchull and Langis to leave. Erchull and Langis told them who they were and why they were there, explaining that they believed they had a right to be there, that they were employed by the same company, and that they were there just to talk to their fellow workers. Risitano and the other manager said that if Erchull and Langis did not leave, they would have to call the police. They then went back inside the store. Before the police arrived, Risitano came back out of the store and told Erchull and Langis to leave or he would have to call the police. Erchull and Langis said that they were not going to leave and Risitano went back into the store and called the police. Erchull and Langis offered the managers the letter to store managers explaining why they were there (GC Exh. 16), but they refused to take it. The managers did not suggest to Erchull or Langis another location they could remain at to solicit their co-workers.

When the police arrived, they went into the store first and then came out and told Erchull and Langis they were on private property and would have to leave. Erchull and Langis tried to explain who they were and why they were there, but the police officers insisted that they leave. In explaining who they were and why they were there, Erchull and Langis offered the officers a copy of the letter they had for police chiefs (GC Exh. 17), but the officers refused it. Erchull and Langis then left.[42]

The record contains other photographs of Erchull and Langis soliciting co-workers that day taken by Patrick and Michael Connors. R. Exhs. 18, 21, 31, 32, 37. Respondent's Exhibits 18 and 21 appear to be from the same store as these pictures, while Respondent's Exhibits 31, 32, and 37 appear to be from another of Respondent's stores. The record does not identify which two stores are depicted in these photographs. Langis was able to identify himself, Erchull, and a customer, but not the gentleman in blue, who also appears to be depicted in Respondent's Exhibit 21 standing with Erchull and Langis. There also appears to be a fourth unidentified individual standing behind Erchull in Respondent's Exhibit 21. Langis testified that Respondent's Exhibits 31, 32, and 37 depicts him and Erchull speaking to managers of the store. There also appears to be a customer pushing a shopping cart in each of the pictures. The three pictures offer further support for the conclusion that, while they were at Respondent's stores, Erchull and Langis were not interfering with anyone's ability to pass, enter, or exit the stores.

F. The UFCW's Alleged Misconduct

1. Community Groups

As mentioned above, Patrick Connors testified that the UFCW wanted to enlist other organizations in the communities where it was organizing to support its organizing drive, but it did not advocate the views of these other organizations during the campaign. The UFCW encouraged these groups to let the public know about the UFCW's dispute with Respondent. A document the UFCW handed out either to its organizers or to other community organizations entitled "elements to planning a campaign," included this sentiment, as it states "building support among non-labor community organizations and faith based organizations." The community groups to which the UFCW reached out included: Jobs for Justice; SLAP (Student

[42] Although Respondent called Risitano to testify in this proceeding, he did not testify about the events of February 6, 2004.

Labor Action Project); Tufts Slam, Student Labor Action Movement at Tufts; and, various environmental groups.

Connors was asked to review documents produced by some of these groups and to testify about them. There was no evidence that the UFCW distributed or condoned these documents.[43] One of the documents Connors recognized was a document with a coupon attached saying "Worker's rights and Shopper's rights." The document includes a dragon with the letters "GMO" on a container of milk, which stands for genetically modified organisms. The UFCW is not included in the list of sponsors listed on the document, but Connors did recall seeing it. Connors also identified the message concerning why a union is important to Star Market workers on the reverse side of the document as information that apparently came from the UFCW. Connors testified that the document was distributed to the public by other organizations.

Connors was asked about a document with Respondent's CEO's picture on it saying "wanted for crimes against working families." R. Exh. 7. Connors testified that he recalled seeing the document, but did not know who had shown it to him. Connors knew that the UFCW did not produce this document, and he knew that he had no role in distributing this handbill. The document was produced by SLAP.

Despite Connors' testimony describing the relationship the UFCW had with groups it reached out to during its campaign, and indicating that the UFCW did not advocate the other groups' positions, Nadworny, who was in the room during Connors' testimony, asserted that Connors had testified that the Union was part of a coalition of groups. Nadworny then testified that some of these groups were involved in activity against Respondent, although, for the most part, he did not describe any specific activity or any personal knowledge he had of such activities.

Regarding these group activities, Nadworny testified generally that SLAP organized demonstrations at various Respondent locations.[44] He further testified that Jobs with Justice advertised meetings to coordinate organizing activities against Respondent. Nadworny identified other actions taken dealing with Respondent, such as a demonstration at the British Embassy, but he failed to say who organized this demonstration and who was present. Nadworny testified that he has looked at the websites for some of the groups the UFCW worked with, and found that SLAP was formed by Jobs with Justice and that the UFCW was a member of the Jobs with Justice Coalition.[45]

Regarding documents produced by these other organizations, Nadworny was asked to identify and comment on them. Regarding Respondent's Exhibit 4, the document sponsored by Jobs with Justice, Clean Water Action, Greenpeace, and the Boston Global Action Network, Nadworny testified that he believed this document was disseminated in a public place sometime in the spring of 2002. He believed the document was used at a SLAP or Jobs with Justice demonstration, since he saw it in relation to a website as being a handout for the demonstration. Nadworny believe it was used at a demonstration, since store level people at Respondent (he did not identify who, when, or from what stores) sent this document to Nadworny and represented that they had received it as part of a handout at a demonstration.

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[43] Some of these documents, R. Exhs. 5 and 6 were rejected and did not come into evidence.

[44] Nadworny typically answered leading questions or general questions without first laying a foundation concerning how he knew what it was he was testifying about. Accordingly, it is often difficult to ascertain with any specificity what he is describing.

[45] No documents were offered to support this testimony.

Nadworny was asked about Respondent's Exhibit 7, the document with Respondent's CEO's picture on it produced by SLAP. According to Nadworny, this document was handed out at Respondent's Prudential Supermarket location as part of a demonstration organized by SLAP. Regarding Respondent's Exhibit 8 and 8(a), another document that Nadworny testified was handed out at the Prudential Supermarket location in April 2003, long after the Complaint violations occurred, Nadworny offered the following concerning the document on direct examination – "I believe this was a handout that was given out when the store was – the new store was opened, as a Shaw's Supermarket in April." On the top of the document it states "SHAW'S THE CHOICE IS YOURS! Shaw's advertises "The Choice is Yours." Let's take them up on their offer." On the bottom, this document indicates it is from Massachusetts Jobs with Justice and provides a phone number and web site for that group.[46] Emily Hardt was asked if she had ever seen this document and she testified that she had not. Indeed, she testified that she had not seen any of the documents that Respondent asked her about.

When General Counsel objected to the introduction of this exhibit, Nadworny then testified that he knew it was handed out in April of 2003 "Because it was given to me that evening by the people who were watching the protesters, who included representatives of 791, who were leafleting people coming in and out." Later, on cross-examination, when Nadworny was asked about this document, he testified that it was given to him by the people outside and he admitted that he himself did not see anyone from the Union handing this document out, only that he had seen people outside that he recognized from the Union. When he was asked whether there were other groups outside, he said no, although he later admitted that whether he would recognize anyone from another group would depend on who they were.

Nadworny was asked about a document that is a printed copy of a web page, which he states is from a SLAP website, although the bottom of the page indicates it is from "www.seiu285.org." R. Exh. 58. The document describes how SLAP visited Ross McLaren. Nadworny admitted that he had no knowledge of any of the different actions described in the document. When asked if he was blaming the Union for this particular document, Nadworny testified that he was "not saying the union did or didn't author it. Have no basis to know whether it did or not."

Regarding all of the documents Nadworny testified about that did not indicate they were sponsored or written by the Union, Nadworny admitted that he did not know if any of them were given to employees.

2. The UFCW's Message

Respondent did not raise any issues concerning documents routinely distributed by the UFCW during its organizing campaign. Rather, Respondent pointed to documents the UFCW did not sponsor, as discussed above, and to one document the UFCW apparently did produce, and to the UFCW's radio campaign. Regarding the one document introduced by Respondent which has the UFCW stamp on it, it asks the question "Is Star Market a Good Neighbor?" R. Exh. 59. It then asks questions such as whether Respondent pays its workers enough to live on, or raise

[46] There is a picture in evidence of a woman, wearing a yellow UFCW shirt, holding a Jobs with Justice sign, and standing next to a person holding a sign that says "Safe Foods Shoppers Unite Workers Risk." R. Exh. 81. There was no testimony offered regarding who took this picture, when the picture was taken, or about the underlying event depicted in the photograph.

a family. Nadworny testified, without offering any specifics such as when or where, he believed that this flyer was handed out at a number of different Respondent locations, as well as at Respondent's summer basketball league opening.

The UFCW ran a radio advertisement in the fall of 2001. Nadworny recalls that the text of the advertisement as it appears in Respondent's Exhibit 3 is what he heard on the radio. The advertisement starts with the phrase "The choice is yours!" The script then states "It's a catchy slogan, but does Star Markets really mean it?" This is followed by information concerning the NLRB charges and the fact that a complaint issued. Next, the advertisement asks listeners to call Respondent's CEO and ask him to "Refrain from further violations of employee rights protected by the National Labor Relations Act; Allow employees to receive information from the Union without management interference; Allow employees to freely discuss workplace concerns, as you allow them to discuss other issues at work."

Respondent was allowed to put into evidence a transcript of a deposition given by Thomas Clarke of the UFCW, in which Clarke was asked about this radio advertisement.[47] Clarke stated in this deposition that he drafted the advertisement and, when asked how he came up with the expression the "choice is yours" in the advertisement, he stated it was because it is a fairly common expression and Respondent was using it in some of its advertisements, as well. Clarke used the phrase because people would identify it with Respondent.

3. Alleged Solicitor Misconduct

Patrick Connors estimated that during the Union's campaign to organize Respondent's stores, for the period from July 2001 through September 2002, the Union made at least 2000 visits to the outside areas of various of Respondent's stores. Connors came to that conclusion by looking at the number of organizers who worked on the Union's campaign and the number of stores they visit in a day. He based it on the period of time he was actively involved in the campaign as an organizer, and the period of time he coordinated the interns. In his calculation, Connors only used the organizers he had information about, which included the approximately 30 International organizers who were involved in the early part of the campaign, the interns he coordinated, and Local 791 organizers when the International coordinated with them. Connors did not use Local 791's visits in his calculations, since he does not know how many times they visited the stores.

Respondent put on a number of witnesses to testify about alleged misconduct by Union solicitors at Respondent's stores. Michael Risitano, who currently works for Respondent at its Londonderry, New Hampshire store as a customer service manager, testified about an incident that he says occurred when he worked as a customer service manager at the Mount Auburn store in Cambridge, Massachusetts.

Risitano testified that in December 2001, during a three-week period, he saw the same man outside the store, mostly on the public sidewalk, about twice a week. Risitano's manager had identified this man as a Union organizer to Risitano. Risitano identified the man as the same man who appears in Respondent's Exhibit 65.[48] On one occasion during this period, after his store manager let him know that the Union organizer was out front, Risitano saw this man

[47] This document came in over General Counsel's hearsay objection to its introduction. Respondent claimed that this document should come in as an admission, though it is not clear how this alleged admission has any relevance in this case.

[48] There is no evidence regarding the circumstances surrounding when this picture was taken or who took it.

inside the store by the dairy department. Risitano testified that after he saw the man, the man came over to him and said, I know what you're doing to which Risitano responded, I don't know what you mean. The man said that Risitano was taking associates and telling them not to join the Union. Risitano replied I am not doing anything and I don't know what you are talking about. The man then said, "suck my dick". Risitano said excuse me and the man then repeated his comment. Risitano said that he did not appreciate that type of language. The man then said, how about lick my balls, is that better? Risitano said I don't appreciate that type of vulgar language. At that point, Risitano started to walk off and the man then said, fuck off. Risitano invited him to say this in front of someone else, but the man said no, just between you and me. Risitano said, I thought that was what you were going to say. Risitano then told the man, who was holding an apple in his hand, if you're not going to buy what you have, leave the store, or I am going to call the police. At that point, Risitano went upstairs to call his human resources manager and the man left the store.

When Risitano was asked what documents he had reviewed before testifying, he became confused. He first said that he had reviewed his affidavit. He explained that he reviewed the affidavit he had given to the police and he got it from them, saying that he had called the police so that is why he gave them a statement. Later, Respondent's counsel explained that the witness was nervous and confusing something he did review with something he didn't. After a discussion on the record wherein Respondent's counsel explained that Risitano had actually reviewed counsel's notes of his discussions with Risitano, when asked if he had filed a police report, Risitano stated "I thought I did. To be honest, now, I have no idea what's going on."

As Risitano's cross-examination continued, he testified that he had actually only spoken to Respondent's counsel and to his store manager. Risitano did not call the police, nor did anybody else. Risitano's store manager had directed him to report any issue with the Union to him.

John Daniel Bickford was the next witness offered by Respondent concerning alleged UFCW misconduct. Bickford was recently promoted to assistant store manager at the University Park Star Market store in Cambridge in March 2004. Prior to that, Bickford worked as a service clerk at the Allston store. Bickford testified that during December 2001, he would frequently see union people outside the store, every week, possibly every other day, though he could not say exactly how frequently or when it dropped off. Generally, Bickford worked the evening shift.

On December 11, 2001, though Bickford usually worked evenings, he worked a day shift. Bickford arrived for work at around 11:00 a.m. and was walking on the path heading out of the parking lot when one of two men near him tried to get his attention. Bickford was running late and noticed that the men were wearing shirts with union insignia and he told them he didn't have time and kept walking past them. According to Bickford, as he was walking away, one of the two men, who was shorter than he was, said "Go fuck yourself." Bickford had never seen this man before and has not seen him since that time. Bickford testified that when the man spoke to him, Bickford stopped, turned around, walked up to him and said, "Well, you have my attention now, if you have something to say to me." Bickford testified that the man then said, "hey, go fuck yourself. Go get hit by a bus."

According to Bickford, after this occurred, rather than have a heated discussion, he went inside and told his service manager what had happened. Bickford testified that he reported this incident to his service manager because he was uncomfortable with it. By the time Bickford went to look for the two men they were gone.

Bickford was asked about whether Respondent had shown any videos about unions at his store. Bickford remembered seeing the video with a group and felt that it was "an informative video that explained what unions were about." Bickford could not recall the details. When Bickford was asked if the video said nice things about the Union, he answered, "It stated facts in the video."

Marilyn Cumming works at Respondent's Porter Square store in Cambridge, where she has worked for seven years in various capacities. A couple of years ago, at the end of October or early November, there was a period of time in which Union organizers were constantly outside of the store. According to Cumming, the Union organizers were there a lot during this period of time, though she is unsure how long that lasted. Cumming testified that she would see the organizers on her break, at lunch, and at the entrances. Cumming found the Union organizers' presence "agitating" because on breaks she wanted to be alone or talk to whomever she wanted.

Cumming described one incident in which she felt agitated by the organizers. On this occasion, Cumming was on a break talking to a co-worker in the designated break area when a union worker came up to them. Cumming told the organizer something like, "I know it's on the Union, I don't want anything to do with it, please back off." According to Cumming, the organizer kept talking and talking and persisted even after Cumming told her to get away, since she didn't want anything to do with the Union. Cumming says she and her co-worker went inside since it was close to lunch and she was ordering a pizza.

Cumming said that the Union organizers irritated her, since she had told them she did not want to speak with them, but that she only wrote down the one incident she described above and that she only got as agitated as she was that day on three occasions. She did not write about the other two occasions, though her store manager told her that if she had any other problems during her break to speak to him and to write it down so she could remember the incident. The reason she reported this one incident to the store manager was because she was so irritated.

Steven Watson has worked at several of Respondent's stores and currently works at the MIT store. Watson testified to an incident he says occurred while he was working as a receiver at Respondent's Fenway store, just prior to Halloween two years ago. Watson, who worked at the back of the store, testified that one day he heard from other employees that Union people were outside the store. Watson himself had never seen the Union before at the Fenway store and never saw them after that day.[49] He only had one interaction with a Union organizer.

On that day, he was walking to the hospital, which is about a mile from Respondent's store, when a woman approached him. Thinking she might be a customer, he stopped to listen to what she had to say.[50] The woman was not wearing anything identifying herself as a Union solicitor. Watson could not recall if there were any other Union organizers outside the store on that occasion. Watson figured out pretty quickly that she was a union member when she said she wanted to talk about something work related and he said, "no, thanks." According to Watson, the woman continued to talk to him, however, saying things about how Star Market employees did not have any representation and could be fired at any moment. Watson again

[49] Watson has seen Union organizers on one occasion outside the MIT store wearing shirts that said Star workers have a right to organize or something like that, but he could not recall them handing out literature or doing anything else.

[50] Watson was going to visit his wife at the hospital, where she was going to deliver triplets.

said "no, thanks," that he didn't want to hear what she had to say, but the woman continued to talk to him and, according to Watson, followed him to the hospital. The woman talked and walked, even though Watson says he asked her about 10 times to stop. Watson says he reported this incident in passing the next day to his store manager. Watson testified that he could see employees were frustrated with being approached by the Union on their breaks, but he admitted that employees did not say that.

Employee Grazyna Krasinski, known as Grace, has worked for Respondent for 16 years at numerous store locations, including for a period of time at the Norwood store. Krasinski worked as a meat wrapper when she worked in Norwood. Krasinski testified about events that happened at her store in April 2002. During this time, she claimed that the Union organizers were outside her store every day for a couple of months. Krasinski admitted that she was against the Union and didn't want it in the Norwood store. She further admitted that she did not want her fellow employees to sign union cards.

Krasinski testified about two incidents that she says occurred in April 2002, though she was unable to testify about them without having Respondent's counsel read an earlier affidavit she provided to Respondent as past recollection recorded. According to the unprompted testimony of Krasinski, sometime in April 2002, while out on a cigarette break with two or three co-workers, a Union organizer asked them if they wanted to join the Union.[51] Krasinski responded that she was not interested because she was not interested in joining any organization. The Union organizer asked her why and she said "Cause I just don't." That was the end of that particular exchange.

During the next couple of weeks, Krasinski saw the Union organizers regularly outside the store and once she was outside by herself having a quick cigarette when she saw a lady handing a card to the union guy. Krasinski then went into the store and told the produce manager about it. Krasinski told him "I saw Allison handing a yellow card to the Union guy, I guess she signed a union card." Krasinski says the two of them started laughing and that was the end of the discussion.

Krasinski then testified that a week or two later, the Union guys came back and spoke to her while she was sitting outside. They said "Why did you say something about a person who was signing a card or talking to us to management." Krasinski responded that she didn't think it was a big deal that the management and she were laughing about it. To this, one of the Union guys said, "Well, you must be a good kiss ass to the management, that's why you say whatever you see outside, you say that." After that, Krasinski went back to work and told the night manager about it and she said "Can I get a raise now?" That was the end of it. According to this version of Krasinski's testimony, she "thought it was funny, I never made anything out of it and that's it…."

After Respondent's counsel tried leading Krasinski through her testimony, having her review her affidavit, Respondent's counsel had her read into the record a part of the affidavit. Krasinski's affidavit provided "The man told me kiss ass like me would benefit from a union-free store and that I have made a mistake." When asked to describe the man, Krasinski's unprompted response was "He was tall, it's – dark hair, I thought he was older but he's almost the same age as me, I don't know, I thought was like 45, 50 years old, which I am too." After reading her affidavit, she testified, "Yeah, he was tall, about six-foot, kind of, you know

[51] Krasinski testified that there is a bench for employees around the corner from the store's front entrance where employees have breaks.

heavyset, not heavyset, to me, they're all bigger than me, all the guys." Respondent's counsel also asked her if she felt uncomfortable and she said that she did because she was sitting down and he was bending over toward her when he talked to her.

On cross-examination, Krasinski testified that she was scared when the Union organizer bent over her, but she also admitted that when she told the manager about it she thought it was funny, but she didn't laugh. Krasinski testified that she asked the manager what the kiss-ass management saying meant, and when she found out what it meant, that is when she asked if she was going to get a bigger raise. Krasinski admitted that other than this one interaction, she has had no difficulty with the Union. In fact, she testified that since that time she and the Union organizers have reached an understanding where they no longer talk about the Union, since they know how she feels. Instead, when they are outside at the same time they will talk about other things like the Red Sox or whatever comes up.[52]

Employee Michael Zitola has worked at a number of Respondent's stores, including the Orleans store. Although Zitola has seen Union organizers outside Respondent's stores on other occasions, he only talked to a Union organizer on one occasion in July or August 2001, during the day. Zitola recalls that he was going towards his car to go home when a gentleman who had been in another car approached him. Zitola knew the man was a Union organizer, since he had approached other employees in the parking lot that day. Zitola had only seen the man talking to employees in the parking lot and nowhere else. According to Zitola, the organizer said he wanted to talk to him about something. Zitola testified that he told the organizer that he was not interested and kept walking. Zitola says that the man kept following him and said he had information for him.[53] Zitola said that he was not interested and kept walking, but the organizer followed him. Zitola testified that he then turned around and told the organizer that he definitely did not want to talk to him and if the organizer didn't stop following him, he might be looking at the sky. The organizer then turned around and went back into his car. That was the entire interaction. Zitola thought this exchange took about 30 to 60 seconds, since he never stopped walking and just continued on his way.

Kristen Largenton testified about an incident that she says occurred outside Respondent's Porter Square, Somerville store in November 2001.[54] At the time Largenton was a payroll clerk in the store, working mostly for the human resource manager. Largenton testified that as she was leaving work and walking down the sidewalk to her car, which was parked in the associate lot a block away, she heard someone from behind say to her, excuse me, a few times, as if they were trying to get past her. Largenton testified that she moved over and, as she did so, a woman grabbed her shoulder from behind with enough force to almost turn her around. Largenton, who was wearing her Star Market shirt, figured the person was a customer and asked if she could help the woman.[55] Largenton then testified, [S]he said 'Oh I'm' – I don't remember her name but she says I'm from, you know, the labor, blah, blah, blah, and I said you know, 'I'm really not interested, I'm actually management and you don't probably want to talk to

[52] On redirect examination, Krasinski was asked whether there were times that union organizers had taken all the seats at the break bench and she answered sometimes, so she would stand. When asked if she had told the manager that she could not get room on the bench because the union organizers were there, she said that she had, and when asked a leading question about whether this affected her ability to enjoy her breaks, she said that sometimes it did. There were no specifics provided as to when or how often this occurred.

[53] When asked by Respondent's attorney to refresh his recollection with an earlier affidavit concerning this matter, Zitola recalled that the Union organizer had said he had some information about the Union.

[54] At the time she testified, Largenton was a marketing intern in Respondent's corporate office. When she worked in the Porter Square store, she held a variety of positions.

[55] Largenton also used the term "grabbed" in describing how a customer with a question about an outdoor floral display will "come and grab you" to ask a question.

me to begin with' and I kept walking to my car, I got in and saw her still standing there in the same spot where I left her. . . . Largenton testified that she did not want to be bothered, that she was not interested in what the woman had to say, and tried to get away from her as quickly as possible. There is no evidence that the police were involved in this incident.

Largenton testified that although she had consistently seen the Union organizers outside the store on other occasions when she was at work, she was not really involved in any other incidents with them, as she tried to stay away from them as much as she could. She testified that although there had been times when an organizer may have followed an employee going to the McDonald's restaurant located in the shopping plaza, in most instances, if an employee told the organizer to leave them alone they would.

Respondent also offered the testimony of David Farino, Jr., a former employee at Respondent's Porter Square, Cambridge Star Market. Respondent employed Farino for about a year, approximately two years ago, when he was 14 years old. Farino's job mainly involved bagging groceries and collecting carriages outside the store. The Porter Square store is part of a larger shopping area with six to eight other stores. All of these stores share the same parking lot with Respondent's store, there being no separate lot for Respondent's store.[56]

Farino testified that one Saturday in November 2001, while he was trying to work collecting carriages in the parking lot, a Union worker was there trying to get him to sign a card to get the Union into the store. Farino testified that the Union worker tried to talk with him all day. In this regard, Farino testified that the Union worker kept coming up to him, calling things like buddy, even though Farino asked him to stop. Finally, Farino got angry and said to this person that he was going to kick his ass, after which the individual left him alone. Farino reported this to his mother who, he said, made him apologize to the man.

Farino did not report this incident to his manager, or anyone else in the store, choosing instead to handle it on his own. Farino testified that he had seen the Union people outside the store on other occasions before this incident, but he did not experience any problems with them at those times.

Deborah Cagnina has worked for Star Market for about 15 years. She has worked in Star Markets located in Chestnut Hill, Waltham, Wellesley, Porter Square, and, most recently, the Prudential Center. Cagnina testified that she was working at the Porter Square, Cambridge store in November 2001. While she was employed at that store, she observed different Union organizers outside the store just about every day for a few weeks. When she saw the organizers outside, she would try to avoid them when going on break. Cagnina testified that she had encounters with one Union organizer whose name she recalled was Julie. Cagnina testified that Julie tried talking to her about the Union a few times, and Cagnina would say she was not interested, or she would simply walk away and Julie would then leave her alone. Cagnina also offered testimony about another encounter she had outside the store one day while she was on her 15 minute break. [57] She said that while she was outside the store, on the bench drinking coffee and smoking a cigarette, two guys came up to her and sat down, one on each side of her. One of the gentlemen asked if he could speak to her, and she asked what he wanted to speak about. The gentleman replied, the Union, and Cagnina responded that she did

[56] Farino also testified that there is a nearby shopping mall and restaurant that might also use the same parking lot.

[57] Initially, on direct examination it seemed she had several encounters where she was approached by the Union and it was aggravating to her. On cross-examination, however, Cagnina stated that she had only one encounter with a guy from the Union where she became angry.

not want to hear it. The gentleman asked Cagnina how much she paid for insurance, and he said to her that Shaw's managers would be coming in and working and that they were not like Star managers. Cagnina replied that she had no problem, that she came, did her job, and went home. She also testified that they gave her papers, and she described how they went through a pamphlet they had about insurance rates, telling her that if Respondent went union, the Union would get them an increase. She admitted, however, that she could not remember everything the men said. Cagnina said that when she went back into the store, she told the store manager what had happened and gave the papers she received to him, complaining that they were bothering her.

Respondent also called Robert McClay to testify. As mentioned, McClay is Local 791's director of organizing, a position he has held for about 2 years.[58] McClay testified that since the spring of 2001, he has been going to various Shaw's Supermarket and Star Market locations to solicit for Union membership. McClay also testified that there have been occasions when this activity has resulted in his having conversations with the management of these stores about his presence there. McClay was asked whether he had made an obscene gesture toward one of the store managers, and he replied that he was not sure. McClay did admit, however, that he may have made a gesture with his middle finger to someone at one of the stores.

McClay was also shown a series of photographs of Local 791 representatives at three of Respondent's stores. McClay testified that Respondent's Exhibits 72-76 were photographs taken at an event that occurred at Respondent's Falmouth store shortly after the grand opening took place in September 2001. McClay testified that at the time the event occurred, the Union was seeking access to the store pursuant to an after acquired stores clause that is contained in the collective-bargaining agreement Local 791 has with Respondent. McClay stated that a grievance was pending over that dispute at the time. During this event, individuals associated with the Union entered the store to shop for groceries they were donating to a charitable cause. These shoppers wore yellow t-shirts that Local 791 distributed which read "We Support Shaw's/Star Workers Right to Organize." The shoppers were allowed to purchase their groceries without incident. After the shoppers left the store, however, they had an encounter with the police. According to McClay, after the shoppers consolidated their purchases for delivery, and as they were being loaded into the truck and the shoppers were disbursing, the police arrived and collected all the shoppers together and demanded their identification. McClay testified that he asked an officer why they were being detained and the officer advised that the station had received a call that there were trespassers in the building and that he was there to check it out. The officer also advised that they were being detained because they were trespassing. McClay asked how they could be trespassers if they were in the store making purchases, to which the officer replied that they were all wearing the same color t-shirt. No criminal or NLRB charges were filed over this event.

McClay also identified the event pictured in Respondent's Exhibits 71 and 80 as taking place outside Respondent's Newtonville store in about November or December 2002. McClay testified that the bell ringer pictured in Respondent's Exhibit 71 was outside the store every day. McClay further testified that store customers were able to freely pass by where he and the others were standing holding placards, and that no unfair labor practice charges were filed concerning the event.

[58] In all, McClay has worked for Local 791 for about 11 years. Prior to that, he was employed by Respondent at its East Bridgewater, Massachusetts warehouse.

McClay testified that the photographs entered into evidence as Respondent's Exhibits 77 and 78 show him and others wearing jackets with the UFCW logo standing outside Respondent's Norwood store with a police officer.

Finally, Respondent submitted a written offer of proof as to testimony other witnesses would offer on the issue of the UFCW's conduct if they were called to testify. R. Exh. 82. In making this offer, Respondent's counsel represented that it was unable to present two of the witnesses, Larry Rodriquez, who could not be located, and Kristina Oleksyszyn, who now lives in Poland. Counsel also represented that it was unable to reach several unspecified others. Respondent's written offer of proof was received into evidence over General Counsel's objection, but only to the extent that the testimony put in through the offer of proof was otherwise supported in the record.[59] The testimony received in the form of the offer of proof was considered cumulative of that already received from live witnesses. The offer of proof was rejected as to Kim Nguon, as there was nothing already in the record of the nature or severity of the events described. The offer of proof as to the testimony of Bill White was rejected for the same reason. General Counsel respectfully submits, however, that instead of rejecting the offer as to White, the offer should also have been rejected as to Mike Zajko, as there was nothing in the record to support the nature or severity of what Zajko would testify about concerning the events of February 28, 2002 at the Cedarville store.[60]

V. Facts – IBEW

A. The IBEW's Area Standards Campaign

1. The Campaign

Respondent admits to the facts underlying the Complaint allegations concerning the IBEW's area standards handbilling. Respondent admits that non-employee IBEW representatives peacefully distributed handbills in the parking lots, sidewalks/walkways, and other common areas outside its Weymouth, Medford, Revere, and Melrose, Massachusetts stores. As will be discussed below, it also admits that it prohibited this activity by asking the non-employee IBEW representatives to leave those areas, and by calling the police to have them removed if they did not leave voluntarily. Jt. Exh. 3.

[59] Respondent also offered affidavits from some of the witnesses contained in its written offer. R. Exh. 82(a)-(h). The affidavits were rejected. .

[60] It should be noted that Zajko was an assistant store manager in the Cedarville store. As of February 28, 2002, Evan Dobratz, whom Respondent called earlier to testify, worked in the store as an assistant grocery manager. In fact, Patrick Connors testified about the Union's presence outside the Cedarville store on February 27 and 28, 2002, subsequent to the receipt of Respondent's offer of proof, and nothing in his testimony of the events on those days even suggests that the Union was blocking the store entrance on February 28, 2002, as Respondent asserts Zajko would testify. Moreover, Connors testified that Dobratz had observed the Union outside the store on February 28, 2002, as he would have been the department manager Connors identified being there from having spoken to him the day before. Consequently, if Zajko was truly unavailable for the trial, and there is nothing in the record to specifically establish he was, Respondent could have questioned Dobratz concerning the events of February 28, 2002. Despite having the opportunity to question Dobratz on the matter or to recall him to rebut the testimony of Connors, Respondent failed to do so. Respondent did not even challenge Connors' version of the events on cross-examination. Under these circumstances, an adverse inference should be drawn that if asked about the events of February 28, 2002, Dobratz's testimony would not support the testimony of Zajko that Respondent is attempting to offer through its offer of proof.

Local 103 represents electrical workers generally working in Massachusetts within the borders covering the Atlantic Ocean, east along the New Hampshire border, south to Framingham, southeast down to Bellingham, northeast to just north of Randolph, Stoughton, and then east to Cohasset.

Brian Lally is employed as a business agent for the International Brotherhood of Electrical Workers, Local 103. In June 2003, after learning that a company named Commercial Electric was awarded the electrical work at one or two of Respondent's stores in the IBEW's jurisdiction, it sent a letter to Commercial Electric with an enclosed questionnaire. GC Exh. 41. The purpose of the letter was to find out if Commercial Electric was in compliance with community standards. This is standard practice for the IBEW in these situations. Lally sent this letter by certified mail, but he never received a response from Commercial Electric.

Shortly thereafter, in a letter dated July 9, 2003, the IBEW's attorney, Ira Sills, sent a letter to Respondent informing Respondent of its intent to pass out leaflets at various Shaw's Supermarket locations. GC Exh. 42. Attorney Sills noted his position that this leaflet is "lawfully protected under the National Labor Relations Act and under other free speech rights." Nevertheless, he invited Respondent's input "with regard to any objections you may have to this leaflet." The leaflet was enclosed with the letter. Respondent never replied to this letter.

In his testimony, Nadworny admitted that Respondent never responded to this letter in writing, claiming that by the time he saw it the handbilling had already started. Nadworny testified that he believes he saw this letter around July 21, 2003, but he does not know when Michael Gold, to whom the letter is addressed, received it, and he has no reason to believe the letter was not mailed and received in the usual time it takes to mail and receive a letter. In response to this letter, Nadworny and Gold phoned Attorney Sills to talk about the letter and arranged a meeting with Local 103 for July 30, 2003. This meeting is addressed below. At first, Nadworny also claimed that Attorney Sills' letter itself did not indicate union action, but on cross-examination, he admitted that it did.

a. The Handbills

Starting about July 17, 2003, the IBEW began its handbilling campaign. The IBEW distributed handbills and, for the first six to eight times the IBEW handbilled, it also handed out gift cards for Stop & Shop, a competitor of Respondent. In the handbills, the IBEW noted that Shaw's Supermarkets has employed Commercial Electric, "a company that does not pay their workers according to local community standards." The handbill also included the following, "If you share our concerns, take your business to Stop & Shop." An address and map was provided to the nearest Stop & Shop store. Jt. Exh. 3. The Stop & Shop store was used as a suggestion on where to shop since it is Respondent's largest competitor and there is a Stop & Shop located next to every Shaw's. During the period of July 2003 to the date of the trial in this matter, Local 103 agents leafleted about 10 of Respondent's stores on about 24 or 25 occasions.[61]

Local 103 did not leaflet at Commercial Electric or at any other site where Commercial Electric was working. When Local 103 handbilled at Respondent's stores, it did not have permission from Respondent or any of its landlords to leaflet at Respondent's stores. Regarding the $10 Stop & Shop gift cards that the IBEW handed out for a period of time, Lally

[61] Michael Monahan, a Local 103 business agent, testified that the only things the IBEW handed out as part of this handbilling campaign were the handbills in evidence, the Stop & Shop gift cards, and, perhaps, an American flag.

testified that the IBEW probably purchased 350 to 400 of these cards at a bulk price. Lally testified that the union agents gave these cards to individuals they believed would spend the most money. Those that handbilled were members of Local 103 and not employees, they committed five hours of their time, and a small percentage of the volunteers who were unemployed were given $60 before Thanksgiving. Lally assigned volunteers to the particular Respondent store location at which they would handbill, generally trying to put them some place near their homes. Lally based his decision regarding which of Respondent's stores to handbill on who volunteered, so that people could handbill near their homes.

b. The Union's Electronic Billboard

During this same period of time, as it had informed Respondent it would in its July 9, 2003 letter, Local 103 put messages on its electronic billboard located outside its union hall in Dorchester, Massachusetts. GC Exh. 42. The messages on the billboard included: "Shaw's unfair;" the name "Shaw's" enclosed by a circle with a line through it; "all workers deserve affordable healthcare," with a Shaw's logo with a line drawn through it; "Shaw's is being prosecuted by the Federal Government for discrimination against Local 103;" and "red grapes $1.69 a pound, black widow no charge, child safety priceless," with a Shaw's logo with a line drawn through it. The black widow reference was to the story that had made national headlines that black widow spiders were found in grapes purchased from Respondent's supermarkets. IBEW Exhs. 1 and 2. Local 103 Business Agents Monahan and Lally decided on the messages that appeared on the electronic bulletin board.

Monahan was asked about the messages on the IBEW's electronic sign. Regarding the health care policies sign, when Monahan was asked whether he knew what Respondent's health care policies were, he stated that it was general knowledge in the organized labor world that at many of Respondent's stores the workers do not have proper, affordable health care. Monahan testified that it is known that Respondent has a split with respect to affordable health care from the organized and unorganized stores and that there are serious health care issues with that company. Monahan testified that though he has no direct knowledge of Stop & Shop's health care policies, it is known in organized labor that Stop & Shop does not have the kind of health care issues that Respondent does.

Though the IBEW handbill clearly notes that Local 103 does not have a dispute with Respondent, the electronic sign did not include that message. Monahan testified that the electronic sign did not include that message because the sign could not hold all of that information, but he pointed out that the IBEW included that information in very clear language in its handbills.[62] Lally and Monahan each testified that they did not have personal knowledge regarding Respondent's employees' health care costs. [63]

2. Other IBEW Communications

Although Respondent never filed a charge or lawsuit against the IBEW, it appears Respondent will argue that the IBEW sent documents that were untrue to its members during its campaign. Nadworny testified about IBEW documents other than the handbills that Monahan drafted, claiming that some of the statements made in them were untrue. The first is an October

[62] Lally mistakenly testified that the electronic sign, too, included that message.

[63] In his testimony, Nadworny offered his opinion that these signs were not true, but his testimony consisted essentially of his own opinions, and failed to identify any specific portion of the signs that were untrue. Nadworny also admitted that he never voiced any objections about these signs to the IBEW and did not know if anyone else had, since he was not the point person for Respondent on this.

6, 2003 letter written to certain IBEW members. R. Exh. 90. Nadworny testified that the statement in the first paragraph that Respondent "indicated to Local 103 that they will be using the lowest bidders to construct these projects, regardless of the lack of adequate wages and benefits they provide their workers and families" is false. Nadworny testified that the IBEW knew that was a false statement, based on a representation made in Respondent's August 6th letter concerning its bidding process and based on the July 30th meeting where Nadworny claims he told them as much. Nadworny also testified that the letter mentioned a Wakefield project, but, at that time, Respondent had not "let any bids for electrical contracting work for the Wakefield site," so the IBEW could not have lost a bid at that time.[64]

The second document Nadworny addressed was a November 14, 2003 letter to members from Monahan that was left with a bumper sticker at one of Respondent's locations. In this letter members were asked to put the bumper sticker on their cars for the year. R. Exhs. 91(a) and (b). Nadworny testified that the claim in the letter that Respondent had as many as 15 jobs slated over the next several months was false. Nadworny denied that Respondent had that many jobs slated in Local 103's area in the next few months, so the claim was false. In this letter, Monahan also noted that there were four unfair labor practices against Respondent "being adjudicated by the National Labor Relations Board." Nadworny testified that there was a charge filed at that time that was amended, so that must have been what the unfair labor practice reference was about.

On cross-examination, Nadworny admitted that when he testified that Respondent did not plan 15 jobs during that period of time, he was only referring to jobs in Local 103's jurisdiction. Nadworny also admitted that he is not in charge of construction and is not in the construction chain of command. His testimony that there were not 15 jobs planned at the time of the letter was based on a conversation he had with Store Development. Regarding the Wakefield store, when Nadworny was first asked whether there was any construction slated at that location, he said that he did not believe there was any planned construction at the Wakefield location, that there is no current Wakefield store. When asked whether Respondent was planning on building a store there, he admitted that it was.

Nadworny was then asked about the status of construction at numerous stores, and he testified about each of them. For many of those locations, his answer included the fact that he did not know of any construction activity or that he was unaware of any activity.

Regarding the statement by the IBEW in Respondent's Exhibits 91(a) and (b) and 92, that Respondent has as many as 15 jobs slated over the next several months, Monahan explained that the jobs he referenced were not limited to Local 103's jurisdiction, since IBEW Local 103 members can work anywhere. IBEW contractors are not bound to the jurisdiction and can bid on jobs anywhere they want to and take IBEW members with them. Members can also choose to work in other IBEW jurisdictions. To determine how many jobs Respondent had coming up, Monahan reviewed a construction publication called the Dodge Reports (where upcoming jobs are listed), and the newspaper. There were at least 15 jobs at Respondent's locations reported in the Dodge Reports. [65]

[64] Regarding Monahan's October 6, 2003 letter concerning Wakefield, Monahan sent this letter to members in the Wakefield area.

[65] At that time, Respondent was slated to move into former Ames' locations. Ames is a department store that closed. Since that time, however, a federal judge has ruled that Respondent could not move into all of the Ames' locations.

3. Respondent's Pre-Complaint Efforts to Prohibit the IBEW's Handbilling

As mentioned above, Respondent does not deny that it prohibited IBEW agents from peacefully handbilling on its property. Jt. Exh. 3. Indeed, in a letter dated August 21, 2003, Vice President of Labor Relations Nadworny wrote to Attorney Sills stating that the IBEW agents leafleting on the premises of various Shaw's stores were in violation of the requirements of Shaw's solicitation policy. GC Exh. 44. In the letter, Nadworny noted that "Shaw's policy is designed to permit limited solicitation only for civil and charitable purposes that the Company believes will be of benefit to our customers or business" and then stated "The policy does not provide for soliciting or leafleting by your client." Nadworny also asked the IBEW to cease and desist from this activity."[66] Nadworny also threatened the IBEW that Respondent reserved its right to take all appropriate lawful action should the IBEW continue its activity. GC Exh. 44.

In a letter dated August 27, 2003, Attorney Sills responded to Nadworny's letter. GC Exh. 45. In his letter, Attorney Sills advised Nadworny that it was his position that because Shaw's solicitation policy, as applied, permits various organizations to engage in solicitation or other similar activity, but exempts labor organizations, the policy violates the Act.

Similarly, Nadworny admitted to the facts underlying the Complaint allegations in his testimony. Nadworny testified that when IBEW agents were leafleting in front of Respondent's stores, they were asked to leave the premises and stand elsewhere. Nadworny testified that the IBEW agents were asked to leave because they were "engaged in unauthorized activity, as well as non-compliance with our solicitation policy for civic and charitable organizations." Nadworny added that store management was supposed to ask the people soliciting to leave and, if they did not leave or refused to leave, store management was to call the police to ask them to leave.

4. Respondent's Post-Complaint Efforts to Prohibit the IBEW's Handbilling

Respondent's witness, Joseph Salvatore D'Angelo, is a store manager at Respondent's Revere facility. D'Angelo did not testify about any of the incidents alleged in the Complaint. Rather, he testified to IBEW solicitation activity that took place after the Complaint allegations occurred. D'Angelo testified to three occasions in late August, early October, and late November 2003, when IBEW union representatives solicited Respondent's customers outside Respondent's stores. D'Angelo testified that on each of these occasions, the IBEW agents were outside the stores and conducted themselves in a peaceful and polite fashion.

Although D'Angelo admitted that it was hard for him to specifically recall each incident, he testified about each occasion that the IBEW solicited at his store. On the first occasion, D'Angelo spoke to the IBEW representative who he was told was in charge. D'Angelo asked the IBEW representative what he was doing and the man explained that he was handing out literature to Respondent's customers. D'Angelo told the IBEW representative that he did not have permission to be out there and that he was violating Respondent's solicitation policy. When D'Angelo asked him to leave, the IBEW representative asked if D'Angelo was asking them to leave the property, which they did.

[66] Respondent stipulated that it relied on its solicitation rule in prohibiting the IBEW from engaging in peaceful handbilling on its property. Jt. Exh. 3.

D'Angelo also thought that it was on this occasion that an IBEW representative first showed him a memorandum in which the IBEW explained that it was distributing handbills pursuant to rights granted under the National Labor Relations Act.[67] R. Exh. 85. D'Angelo testified that he was given this document after the IBEW representative said that they had permission to be there. D'Angelo responded and asked them who they had permission from, asking if they had permission from Respondent to be out there soliciting and not shopping. That is when the IBEW representative handed him this document. On cross-examination, D'Angelo testified that when the IBEW representatives handed him the memorandum, they told him that they had every right to be there.

D'Angelo described the October 1 interaction as very similar to the initial August interaction. IBEW representatives were outside the store distributing handbills and D'Angelo asked them to leave. This time, after saying that they would leave, the IBEW representatives did not leave. D'Angelo went out and spoke to them a second time and they told him that they had decided that they were not going to leave. At that point, D'Angelo called the police to have them removed, but the IBEW representatives left before the police arrived.

D'Angelo testified that the third incident in late November was similar to the other two. He also testified that on one of the three occasions when the IBEW representatives were outside the store giving handbills to Respondent's customers, a customer gave him a Stop & Shop gift card. The customer told him that the gentleman outside had given it to her. The customer then asked D'Angelo if she could use the Stop & Shop card at Respondent's facility.

D'Angelo also testified that customers asked him about the IBEW solicitation, but he did not know of anyone who stopped patronizing the store as a result of it. There were people who asked what the problem was and others who asked him why Respondent allowed the solicitors to be out there. D'Angelo also testified that no employee stopped working at Respondent because of the solicitation.

5. The July 30, 2003 Meeting[68]

Respondent offered extensive testimony concerning a meeting that took place between the parties on July 30, 2003. Respondent's defense appears to be based in large part on what it says occurred at this meeting.[69] While Respondent apparently believes that the focus of the meeting was what it labels the IBEW's unreasonable demand that it receive all Respondent's electrical work, the IBEW viewed this meeting as an opportunity to address what it saw as an apparent bias on Respondent's part in using electrical contractors.

In testifying about this meeting Nadworny, admitted that he viewed this meeting as a constructive meeting, but admitted that Respondent did not go over the IBEW's handbill or talk to the IBEW about what it said. Nadworny also testified that Commercial Electric did not come up at the meeting. Rather, Nadworny says the parties discussed the following. First, each of their respective views concerning the IBEW's claim that a general contractor, Marathon Construction, had agreed to a monetary amount with the IBEW for a union contractor (Alden Electric) to do Respondent's job, and then Respondent unfairly rejected the bid. Second,

[67] The handbill is the same as Respondent's Exhibit 85, except for the fact that the store and map included in the handbill would be for the Revere store.

[68] The testimony regarding the meeting was allowed over the General Counsel's relevance objection.

[69] Respondent did not present its point people dealing with IBEW issues, including one of whom was at this meeting – John Rowell from Store Development.

Respondent made clear its bid process which Nadworny says is a competitive process and that the bid awarded is not specifically tied to the lowest bid -- that there are other factors involved. Third, Nadworny says, the IBEW made known their goal to have all of Respondent's work and that it stated its belief that it does not like Respondent's competitive bidding process.

Regarding this last issue, Nadworny testified, the IBEW asked Respondent to review its process for bidding. The IBEW advised Respondent that it had a million dollar fund set aside to supplement bids on Respondent's projects. Nadworny claims that the IBEW also advised that if Respondent did not agree to give the IBEW its projects, the IBEW would use that money to campaign against Respondent, to convince Respondent to give it the business.[70] Respondent said that it would review the process and review the IBEW's proposal with Respondent's principals and respond, which Nadworny did by letter dated August 6, 2003.[71]

Nadworny denied that at the July 30th meeting, Rowel stated that it was hard for the IBEW contractors to compete and competitively bid in Respondent's bidding process because the other bidders did not provide health insurance and pension benefits, and, therefore, IBEW bidders were much more expensive. In fact, Nadworny denied that he knew this to be true, that IBEW contractors are not as competitive as non-union bidders, because non-union bidders do not provide the level of fringe benefits, such as pension and health insurance, to their employees that union contractors provide. Nadworny even denied ever hearing this before. In this regard, Nadworny was asked the following questions by Attorney Ira Sills and gave the following answers:

Q. No one's ever mentioned that to you in your company?
A. No. No one has.
Q. So, that thought – This is the first you've heard that idea from me.
A. I believe so.

On redirect examination, however, Nadworny testified that he did not mean that he had never heard the IBEW's claim that the difference between their costs and non-unionized contractors' costs are often the benefits and wage levels they pay. Instead, Nadworny explained that what he meant by the above interchange was that it was the first time he had heard it directly from Attorney Sills in person.[72]

Monahan, who Respondent called as a witness, also testified about the July 30th meeting. Monahan testified that the IBEW made the following points at the meeting. First, he told Respondent that the IBEW contractors cannot compete against contractors who improperly pay their people with little or no benefits.[73] Second, as mentioned above, much of the meeting was spent talking about how one of the IBEW signatories did not get the Dedham and Waltham contract. The IBEW was very upset about this, since according to Monahan, the IBEW had met

[70] On cross-examination, Nadworny admitted that he did not know the exact words that were used when the IBEW said this and he also admitted that Stop & Shop, Respondent's competitor, tries to get Respondent's customers to leave Respondent and go to its markets by advertising and other means.

[71] In the letter, Nadworny notes that he is following up on the meeting and he enclosed guidelines for Respondent's competitive process. Included in these guidelines is the provision that "Final award will be based on a favorable combination of competency to perform tasks, productivity, efficiency, scheduling and competitive costs."

[72] Nadworny testified that there were other meetings between Respondent and the IBEW, but he did not attend any of those meetings. Despite the fact that he was not even at later meetings, Nadworny testified that Respondent's position was consistently that it supports competitive bidding, that it does not automatically go with the lowest bid, and that Respondent encouraged all bids.

[73] Monahan testified that Respondent has given IBEW signatories contract work on two projects, the Prudential and Lower Mills projects.

the number Respondent, through its general contractor Marathon Construction, told the IBEW it needed to reach in order to get the job.[74] This indicated to the IBEW that Respondent did not want to go with an employer who provided decent pay and benefits to its employees because it did not want to go with a union company.

Monahan testified that there was not a great deal of discussion about Respondent's bidding system. Regarding the bid process, Monahan testified that at this meeting, and on other occasions, Respondent made it very clear that it would use the lowest bidder, regardless of what the contractor pays its people, whether that contractor has any benefits of any kind – Respondent was going to use the lowest bidder. Regarding Respondent's description of its bid process as it is set out in its August 6th letter (R. Exh. 87), Monahan testified that this is different from what they were told by Respondent on many occasions – that the bid goes to the lowest bidder.

Monahan also testified about the IBEW's Market Recovery Fund, which came up at the meeting. The purpose of the fund is to recover markets that have been lost over the years because of unfair competition from employers that don't conform to community standards, and that pay their people less, providing little or no benefits or apprenticeship training. These are the things that make it harder for IBEW contractors to compete, so the fund, which is a joint labor/management trust fund, is used to subsidize the organized employers, to make those employers more competitive in order to regain market share.

VI. Respondent's Discriminatory Enforcement of its Solicitation Rule

The evidence concerning Respondent's application of its solicitation rule demonstrates that Respondent does not enforce its rule in a consistent manner. It is apparent that, at times, Respondent allows purely private groups to solicit at its stores, despite the fact that it says it does not do this. It is also apparent that while the rule involves certain requirements, there is no uniformity in how these requirements are applied at different stores. The only clearly consistent practice with respect to Respondent's application of its rule is that no unions are ever allowed to solicit at Respondent's stores, even for charitable purposes.

A. Although the Rule States That Only Charitable and Civic Solicitation Is Allowed, Respondent Has Allowed Solicitation for Purely Private Purposes in the Common Areas Outside Its Stores.

Sean Bradley testified how, on March 21, 2003, he went to Respondent's Peabody, Massachusetts Shaw's Supermarket and requested the store manager to allow him to solicit money outside the store to fund films his movie company, Copper Mine Films, was making. Although at the time Bradley made this request he was a college student, the films his company was making were not part of a school project and were not for a civic or charitable purpose, but rather, were a completely private endeavor. Bradley testified that he and another individual were allowed to solicit money outside the Peabody store on April 12, 2003. He could not recall if he signed anything for Respondent prior to performing the solicitation. It is apparent that Bradley was not required, as the rule mandates, to execute a release of claims form, as no release form related to this solicitation was produced by Respondent as part of Respondent's Exhibit 83.

[74] Monahan testified that Joe Sheehan of the IBEW discussed the number with Harry from Marathon Construction and John Rowel, but when asked if he could say who gave Alden the number, he could not say.

Similarly, Audrey Yanoff testified that she was allowed to have her daughter distribute literature to publicize her business, Xpress Shapes for Women, outside Respondent's Salem, Massachusetts Shaw's Supermarket on August 1, 2003. Yanoff's daughter leafleted customers in front of the store for about an hour on August 1, 2003. Yanoff received permission from the store to leaflet and she signed one of Respondent's release of claims forms. Xpress Shapes for Women is not a charitable or civic organization, but a private enterprise doing business as an exercise facility, and Yanoff explained that to the store in receiving permission to leaflet. The private nature of this business is reflected in the leaflets that were distributed. GC Exh. 34.

In addition, Respondent commonly allows radio stations to solicit listeners outside its stores. In this regard, Gene Casassa testified about promotions that the radio stations affiliated with the Greater Boston Media Group have been involved in outside Respondent's stores. There are five stations affiliated with the Greater Boston Media Group - WROR, WKLB, WBOS, WMJX, and WTKK. At the time he testified, Casassa was employed as the promotions coordinator for WROR. Casassa has also worked for the Greater Boston Media Group as promotions director for national sales, and he worked in promotions at both WBOS and WKLB. Casassa testified that he has been involved in over 100 site promotions during his employment with Greater Boston Media and about six such station appearances at Respondent's stores. Generally, an advertiser of the radio station such as American Express, Vlasic Pickles, or After the Fall Juices typically arranges for a station appearance. The advertiser will advise the station that as part of the advertising schedule, they want the station to appear at a third party location (i.e. a particular Star Market/Shaw's Supermarket) to promote their product. When the station gets that type of request from their advertiser, they will contact the third party, in this case the store manager of the particular Star Market /Shaw's Supermarket involved, to confirm the details of the appearance with them. The appearance, however, would be paid for by the advertiser and not by Respondent. While at the appearance, in addition to promoting their advertiser and their products and/or services, the radio station is allowed to solicit listeners by doing such things as: bringing a vehicle that identifies the station; hanging station banners; distributing station promotional items such as, pens, magnets, key chains, stickers, and tee shirts; playing the station on a portable radio; and bringing station personalities to the site. These appearances attract groups of people outside the entrance of the store, sometimes in large numbers.[75] Although Respondent receives an obvious benefit from this type of promotional appearance, as was demonstrated in the testimony of one witness, David DiMaria, the perception they create to the public is that it is the radio station that is being promoted through its solicitation of listeners. [76]

Respondent also allows the public to engage in private solicitation at it stores, as Respondent's witness Carole Kearney, a general merchandise manager at the South Yarmouth store, described, by allowing postings on boards that are maintained in the vestibule area of the store.

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[75] For example, Casassa testified about one appearance WROR did on behalf of their client, American Express, at a Shaw's Supermarket in Braintree, Massachusetts where the station set up a tent outside the store entrance and a lot of the station's listeners came to make their way through lines to get autographs from two popular station personalities.

[76] Respondent called Shannon Cadres to testify about how the advertising agency Respondent uses to promote its stores will, on occasion, advertise on the radio and have radio stations do appearances at its stores. In contrast to the radio promotions Casassa testified about, Respondent is responsible for paying the radio station for this type of advertising. Like the appearances Casassa testified about, Respondent allows the station to solicit listeners by hanging station banners, parking a marked vehicle in the parking lot, and by distributing such promotional items as t-shirts and stickers.

B. Respondent Applies Its Rule Differently At Its Various Locations

Sharon Fagon testified that in about March or April 2003, she met with the store manager of Respondent's Auburndale Village, Newton, Massachusetts Shaw's Supermarket and requested permission for her cub scout group to sell popcorn in front of the store. Fagon testified that the manager checked the store calendar and granted Fagon's request. Contrary to the letter of Respondent's rules, Fagon was not required to execute a release of claims form, nor was she provided with a copy of Respondent's rules. The only instruction she was given was not to set up in front of the entrance so that customers could freely pass by. Respondent allowed about eight cub scouts (eight and nine years of age) and five adults to participate in the solicitation, although its rule allows for only two solicitors at a time.[77] Although adults were present to supervise the scouts, it was not at Respondent's request. Also contrary to the rule, the cub scouts were allowed to actively solicit customers.

Similarly, the contents of Respondent's Exhibit 83 also demonstrate that Respondent does not uniformly apply its solicitation rules except to completely ban union solicitation. Despite the fact that Respondent's vice president of labor relations, Eric Nadworny, testified that Respondent operated approximately 25 Shaw's Supermarkets and 35 Star Markets in Massachusetts as of September 29, 2003. Respondent's Exhibit 83 contains solicitation records for only 20 stores. In those 20 stores, the records show a total of 156 solicitations ranging from the year 2000 to 2003.[78] The number of solicitations per store ranged from a low of 1 each at Hyannis, Harwich, Gloucester, and Plymouth, to a high of 56 in Salem. Contrary to Respondent's solicitation rule, Respondent's Exhibit 82 further demonstrates that Respondent does not require a release of claims form to be executed by the soliciting organization, since not one such form was submitted by Respondent in connection with the six documented solicitations at the Waltham store. The records contained in Respondent's Exhibit 83 also demonstrate that Respondent allows groups to solicit more than two times a year. Thus, at the Salem store, Respondent allowed VFW Post 1524 to solicit for three days in 2002 (November 10-12), the Disabled American Veterans for three days in 2002 (May 23-25) and three days in 2003 (May 22-24), and Lynn English Cheer Leading for three days in 2002 (June 30, July 27-28). At the Lynn store, where there were 4 documented solicitations, the Little League was allowed to solicit for three days in 2003 (May 1-3). At the Melrose store, where there were 4 documented solicitations, the Disabled American Veterans were allowed to solicit for three days in 2000 (September 9-14) and the VFW was allowed to solicit for six days in the month of May in an unspecified year. Of the 9 documented solicitations at the Saugus store, the High School Girls Basketball team was allowed to solicit for three days in 2003 (January 24-26), the Knights of Columbus for four days in an unspecified year (October 5-8), Hope World Wide New England for what appears to be three days in 2002 (April 6, 13, and 20),[79] and VFW Post 2340 for three days in 2002 (May 24-26). Of the 6 documented solicitations at the Waltham store, VFW Post 10334 was allowed to solicit for three days in 2003 (May 15-17). At the Peabody, Massachusetts store, where there were 7 documented solicitations, Teen Challenge was allowed to solicit for three days in 2003 (February 12-14). Similarly, at the Cedarville store, where there were 12 documented solicitations, Respondent allowed Teen Challenge to solicit

[77] Fagon testified that the five adults were not necessarily present all at the same time.

[78] Although Respondent's Exhibit 83 contained more than 156 documents showing solicitations, Respondent submitted many duplicate copies of the same document. For example, 11 release of claims forms included in the Cedarville store file were also included in the West Roxbury file and, as such, they were only counted once toward the total number of solicitations.

[79] Since the document related to this solicitation has the date April 13 circled, it is unclear whether the solicitation took place all three days.

for four days in 2002 (March 13-14, May 25 and July 20). Finally, at the Stoneham store, where there were 11 documented solicitations, Respondent allowed the Fire Department to solicit for three days in 2003 (August 22-24).

The documents in Respondent's Exhibit 83 also show that, contrary to Respondent's rule, at the Salem store, Respondent allowed two organizations, Disabled American Veterans and Brownie Troop 426, to solicit on the same day – May 22. In addition, these documents further reveal other solicitation by non-civic and non-charitable groups. For example, at the West Roxbury store, of the 15 documented solicitations, one was by the "Gold Wing Touring Association" which, it is submitted, is a group of motorcycle riders. At the Falmouth store, one of the two documented solicitations was by the Cape Cod Curling Club, a group of curling enthusiasts, on behalf of the Habitat for Humanity.

Respondent had several of its witnesses testify about civic and charitable solicitation that occurs at their stores. For example, Evan Dobratz, who had been an assistant grocery manager at the Cedarville store and an assistant manager trainee at the Norwood store, testified that the procedure he followed in cases where civic and charitable groups requested permission to solicit was that the person in charge of the store would show the solicitors where they could set up, which would be in a highly visible area, but out of the way of customers, so customers did not feel they had to make a donation. Dobratz further testified that the solicitors were not allowed to wander or approach customers. [80]

Joseph D'Angelo, the Revere store manager, testified that he allows solicitation at his store as a good neighbor to help the community which, in turn, helps Respondent. He testified about how, on two occasions, in enforcing Respondent's solicitation policy at his store location, when a group did not follow Respondent's solicitation policy, it was not allowed to engage in solicitation activities. On one of these two occasions, a cheerleader who had not sought prior approval to solicit for her group was told she had to first follow the solicitation policy. If she had done so, she probably would have been allowed to solicit. The second instance concerned a group that had already solicited for two days, and since each group gets two days a year to solicit under Respondent's policy, D'Angelo did not let this group solicit further. D'Angelo did not recall, however, the specifics of that incident, such as what organization was involved.

Although D'Angelo maintains solicitation enforcement files at his store, he does not know if store managers are required to keep such documentation. [81] He also does not know whether or not some managers have allowed solicitation without requiring the filling out of an application. D'Angelo does not keep notes of instances when he rejects an organization's solicitation request unless the solicitor requested solicitation time in writing, in which case D'Angelo would write "refused" on top. In the two examples D'Angelo testified about, the requests were made orally, so there was no documentation. D'Angelo denied that groups at his store have been allowed to solicit for more than two days, with the exception of the Salvation Army.

[80] Respondent's Exhibit 82 did not contain any documentation of solicitations occurring at the Norwood store and only 12 documented solicitations at the Cedarville store (not counting the 11 documented solicitations that were also included in the West Roxbury file) covering the years 2002 and 2003.

[81] In fact, there are no records of solicitation occurring at the Revere store prior to March of 2003. D'Angelo searched for those files when he became manager, but discovered that no solicitation records were kept prior to his arrival. Even though Gary Arnold, the former Revere store manager, still works for Respondent, D'Angelo never asked him whether he required applications for solicitors at the store. There were similarly no records from the prior managers.

C. Respondent Consistently Prohibits Solicitation by Labor Organizations

Respondent's witnesses admitted that labor organizations are prohibited from soliciting outside Respondent's stores under its policy. Respondent's witnesses testified that the IBEW would not be allowed to solicit outside its stores, regardless of whether they followed Respondent's policy or not. In addition, Joseph Ferreira, a senior store manager who is responsible for Respondent's Dartmouth store and also oversees a group of Respondent's stores, testified over objection about leafleting activity by the Carpenters union that had taken place a couple of days before he testified. The leaflet handed out by four men to Respondent's customers indicated that Respondent's stores were dirty by quoting the Rhode Island Department of Health and the Environment Sanitation Inspector. The leaflet also referenced the pending unfair labor practice complaints and asked customers to "please try stopping and shopping elsewhere." The leaflet clearly identifies the author of the leaflet as it states "A message from the New England Regional Council of Carpenters-fighting for good jobs for our community." R. Exh. 86. Ferreira testified that he would not have let the Carpenters Union pass out this leaflet even if they had sought prior approval. In fact, Ferreira testified he would not have let them do anything in front of the store because the Carpenters Union is a labor organization and not a non-profit organization.

Respondent would not allow unions to solicit at its stores even if the solicitation was for a charity.[82] This point was made by Nadworny when he was asked whether Local 103 members would be able to collect for a charity, such as the Jimmy Fund, if they identified themselves as Local 103 members.[83] At first, Nadworny said that he could not specifically answer that question. He did clarify, however, that, in relation to the policy, it would depend on whether they were a civic or charitable organization. If they were not, then they would not be covered under the policy. Nadworny testified that, in his view, Local 103 is neither of these.[84]

D. Respondent's Defense to its Discriminatory Enforcement of its Rule

Respondent defends its discriminatory enforcement of its solicitation policy by claiming that it should be allowed to discriminate so as to allow solicitation only by civic and charitable groups that it considers helpful to its business. It maintains that only groups that advance its business purpose should be allowed solicitation rights. While this argument has been rejected by the Board, Respondent is making this argument based upon certain circuit court decisions.

[82] As the Cape Cod Curling Club was allowed to solicit for Habitat for Humanity at the Falmouth store. R. Exh. 83.

[83] Local 103 has been extensively involved in civic and charitable events. For example, Local 103 members have provided free labor and materials for various causes, including wiring the Boston schools, Habitat for Humanity, and a Veteran's homeless shelter. Annually on Father's Day, Local 103 solicits money for diabetic research when it participates in the Dollars against Diabetes campaign conducted by the building trades. IBEW members solicit on public streets and at some retail locations, including two locations where Monahan lives in South Boston -- Brook's, formally known as Osco's, and Stop & Shop, formally known as Flannigan's. IBEW members solicit on those premises, but Monahan does not recall if he sought prior permission to do this.

[84] Respondent's managers gave inconsistent testimony about this, although they agreed it would be up to corporate.

Solicitation and the Positive Shopping Experience

Respondent called two witnesses to talk about the shopping experience generally.[85] The first of these two witnesses was Nicola Jane Difelice, Respondent's senior vice president for marketing. Difelice explained that her job is to drive sales by acquiring new customers, getting existing customers to spend more money in Respondent's stores, and ensuring that existing customers do not defect to other places to buy products. She claimed Respondent's industry is very competitive, with more challenges now than ever.[86] In addition to these challenges, there is the cost challenge, escalating pension and health care costs.[87] Difelice testified that Respondent must be relentless in growing sales and Respondent can only grow sales by taking customers away from other people and stopping its customers from going elsewhere.

Respondent has three major ways to grow sales, the one that Respondent needs to do most is to increase brand strength; increasing loyalty among its customers.[88] As part of this strategy, Respondent works on the customer's image of Respondent or, as Difelice put it, "emotionally the image they have" of Respondent. Respondent has to find ways to differentiate itself from its competitors. Respondent has been relying on store friendliness and the whole shopping experience generally and brand image to differentiate itself and get loyal customers.

This friendliness and shopping experience, Difelice testified, is about the associates. It is the in-store experience. When a customer comes to Respondent's store, the experience includes how friendly the associates are, how helpful they are, and the overall experience the customer has while at the store.

Difelice testified that one obstacle Respondent has in making its customers happy is that customers do not really like grocery shopping. According to Difelice, there is research showing that customers "have some kind of hostile dependency on their shopping." Difelice says that when customers come in to shop, they are "passionately negative about it." Respondent, therefore, needs to make shoppers feel better about shopping, alleviating any of the stress points that they may see when they enter the store.

Regarding these stress points, there are things in a store that could make them feel uncomfortable. For example, Difelice knows that customers do not like to see associates talking to each other. Rather, they only like to see associates interacting with customers. Customers do not like to wait in the check-out line and they do not like it when there are items out of stock. According to Difelice, "those negative feelings can translate into like an emotional drain on them."

The customers' shopping experience, Difelice testified, begins when they get in their car to think about going shopping. A traffic jam on the way to shopping could impact them negatively, as could a bad parking lot experience. Respondent needs to make sure that they are comfortable when they first come into the store. When a customer walks in the door, Respondent strives to have the customer have this "wonderful feeling of produce and food and quality."

85 This testimony came in over General Counsel's objection.

86 These challenges include: the economic downturn generally; the fact that Wal-Mart (especially their super centers) and other businesses now sell food; and, the fact that more people eat at restaurants than was previously the case.

87 Respondent's volume of business last year was around four and a half million dollars of sales.

88 The other two ways to grow sales are to add more square footage to its stores and to do direct promotions.

Respondent had another witness testify to the same assumptions concerning the shopping experience. This witness, Kathleen Seiders, is an associate professor of marketing, who Respondent presented as an expert in "grocery store marketing and customer shopping behavior."[89] Seiders, who was paid for her testimony, has no relationship with Respondent and does not know how Respondent applies its solicitation policy. Seiders testified that there are five dimensions to customer convenience and access to the store is one of these dimensions. There is nothing unique about a supermarket in this way, since any store attracting customers' needs for people to be able to get there.

Difelice and Seiders testified that one way of building customer loyalty is a solicitation policy. Difelice identified Respondent's written solicitation policy that has as its original date 11/92, with a revised date of 1/02. R. Exh. 54. Despite her testimony on direct examination that she believed this policy was essentially the same policy as was in effect since at least January 1, 2001, when Difelice was asked on cross-examination what the earlier policy had been, she admitted that she did not know what the policy was before January 2002, and she did not know what revisions were made in January 2002.

While testifying that the solicitation policy has, as its purpose, building up good will in the community, Difelice and Seiders admitted that they have no idea how Respondent's solicitation policy is actually implemented or enforced. Instead, they offered general testimony regarding the policy, stating that, it is common in the grocery store industry, that it makes good business sense, and that it is a way to build customer loyalty without costing anything.[90]

Difelice testified on direct examination about her general knowledge concerning what groups Respondent has allowed to solicit at its stores and what groups it has not permitted to solicit, although she later admitted on cross-examination that she did not know which groups are allowed to solicit and which groups are not. Difelice testified that Respondent decides what groups are acceptable at the local and corporate level, and that the store manager and corporate use their best judgment to determine what will offend people.

Regarding the mechanics of the policy, on direct examination, Difelice testified that a party cannot just show up on site and solicit. Difelice also testified that a party wandering all over the property and in the parking lot would not be able to solicit. Yet on cross-examination, Difelice admitted that she really did not know how the policy was implemented because it is a retail operations policy, that people in retail need to be familiar with it, and she is not retail. Thus, when specifically asked what would happen if solicitors were in the wrong spot, she admitted that she did not know what the store manager's response would be. When asked why she had testified that people would not be allowed on the premises if people were not where they should be, she stated that she was referring to the fact that she thought the customers would find it uncomfortable, but that it would be within the store manager's discretion to decide what to do with those people. She explained that the impressions that she was testifying to on direct examination were not, in fact, how the policy is implemented. Rather, she was testifying about how customers may or may not feel.

89 Seiders was allowed to testify as an expert on marketing, over General Counsel's objection, subject to a further ruling.

90 Seiders testified that grocery stores permitting civic and charitable solicitations is the norm in the industry and to cease permitting solicitations could engender ill will. She explained that grocery stores draw their employees from the local community and these stores are seen by customers as part of the community, so people feel good when they see stores involved in the community.

Difelice also testified, though, as it turned out on cross-examination, without really knowing, that charities are not permitted to solicit unless they go through the formal policy and procedure and apply to do it. She also testified that private organizations and controversial organizations are not allowed to solicit, although she recalled that the Boy Scouts have been allowed to solicit and Seiders testified that the Boy Scouts have some controversy associated with them. Despite Difelice's assertion regarding private and controversial groups, on cross-examination she admitted that she does not know what groups are actually allowed to solicit, and she even admitted that she does not know whether or not unions would be allowed to solicit under this policy, since she does not enforce the policy.

Despite this admission, that she does not know whether unions can solicit under Respondent's policy, Difelice testified that unions would not be able to solicit under this policy for four reasons. First, they are not an organization that is for charitable or civic purposes. Second, the organization is controversial and Respondent wants to avoid offending anyone. Third, the solicitation policy speaks to soliciting customers and the union is soliciting employees. Finally, the solicitation needs to be passive and with a union it would be very active and could be aggressive.

Difelice also reviewed certain pictures offered by Respondent to show what she thought would and would not be appropriate under the solicitation policy. Difelice thought the picture with a man standing at a table at the Orleans store with a smock and three smock poster signs attached to his table near the entrance of the store saying "Help God's special children, Knights of Columbus" looked like it fit within the policy, as did a picture with the same looking set up without a person present. R. Exhs. 44 and 55. Difelice conceded on cross-examination, however, that the way this booth was set up at the entrance or exit of the store bothered her, because the location would bother customers. Yet, she testified that it would be up to the store manager to decide whether the location was acceptable. The location also bothered her because it suggests aggressive solicitation. Additionally, Seiders testified that the message "God's special children" could offend some customers because it has religious overtones.

Difelice did not think that the individuals talking in Respondent's Exhibit 25 would fit in the policy, since these people are crowding the entrance and causing uncertainty as to what is happening.[91] Difelice explained that two or three people congregating outside a store could make others feel uncomfortable. Seiders testified, however, that if a customer saw two people talking in a break area and could not hear them that would not cause the customer any concern and would not be a problem for Respondent. The concern is only when uncertainty is caused outside the store. Sediers testified that, for example, a gathering of a few people with a policeman could create uncertainty in the customer's mind. Difelice did not know if the truck in front of the store, causing customers to walk around it, would make them feel uncomfortable.

Difelice also reviewed Respondent's Exhibit 32 and claimed that a woman in the picture was looking at the people in the entrance and "trying to work out what they're doing."[92] This, according to Difelice, is problematic, since the customer seeing this "probably wouldn't come into the store. They may just think it's much easier to get back in their car and go to the next place." Difelice thinks that the conversation by the group in front of the store could be problematic even if they were talking about church or the Red Sox, depending on how long they were there. It would depend on the customer.

91 This photograph is discussed above in Section E. 3(b).

92 This photograph is discussed earlier in Section E. 3(e).

Difelice testified on cross-examination that Respondent does not have a rule prohibiting people from talking in front of the stores, even union people. Her concern with an associate talking to someone identified as a union person is that it may cause "some uncomfortableness" in the customer because the union is controversial. The customer may wonder what was happening. Her other concern is that the associate may be unhappy if it is an unwelcome solicitation. Respondent needs its associates to feel happy and concentrate on the job they do.[93] Difelice did concede, however, that from her marketing point of view, and with her experience, if the associates continued to be good workers despite union solicitations, and they did not feel uncomfortable, she would not feel that Respondent is harmed by its employees being exposed to union solicitation or representatives.

Regarding union solicitation, while Seiders believed that allowing charitable and civic solicitation has a positive impact on Respondent, allowing union solicitation could cause a neutral or negative effect. It would have a neutral effect if no norms were broken, but it could have a negative impact if norms were broken, if, for example, voices were raised or the length of time individuals spend talking. There is the potential for a negative impact if the employees are negatively affected or the customer feels uncertainty. Seiders also testified that people trying to persuade others to have union representatives is a traditional and legal American activity.[94]

Both Difelice and Seiders testified that it would be problematic for Respondent to stop allowing civic or charitable groups from soliciting "on its property." Difelice testified that this was the case a few years ago when one of Respondent's competitors tried doing that and there was a great deal of bad publicity about it. Respondent receives positive feedback from customers who appreciate the solicitation that is allowed and the community expects it.

Respondent has one major solicitation of its own once per year for its associates and that is for the United Way. It is another way to show community support. Additionally, Respondent is involved in four organized solicitations per year. During these solicitations, associates ask the customers directly for money. Respondent does this to generate good will in the community. Respondent also supports the community in other ways; such as giving money directly to community organizations, donating product to organizations, and associate volunteering.

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93 Respondent prepared a video described in Charging Party Exhibit 1, in which Respondent made its philosophy towards unions that it should never need one very clear. The video included a warning that job security can only come from being able to successfully compete in the marketplace, which is described as becoming increasingly competitive, by becoming more flexible, more efficient, and more competitive, but only with its employees' help, including keeping out the "serious threat" of organized labor. Although he was involved in preparing this video and is the head of labor relations, Nadworny testified that he did not know if this film was ever shown at any of Respondent's locations. The transcript of the arbitration at which this film was discussed indicates that it was indeed shown to new hires at the Falmouth location. CP Exh. 1.

94 Difelice and Seiders also testified about documents Respondent claims that are tied to the UFCW's organizing efforts that groups allegedly distributed to the public. Difelice and Seiders did not know whether these documents had been distributed or by whom, and this testimony was permitted subject to Respondent later showing that the documents were, in fact, distributed to the public by groups tied to the Union in this campaign. Respondent did not make this connection with respect to Respondent's Exhibits 4, 5, or 8. Difelice testified that Respondent was concerned about the effect these documents would have on its image and whether they would make customers uncomfortable and make them stop shopping at Respondent's stores. R. Exh. 7. Respondent would not, according to Difelice, allow the group putting out this kind of literature or groups aligned with it to solicit on its property. Seiders testified that these documents could cause alienation and defection of Respondent's customers. Seiders also testified that a document apparently produced by the Union concerning Respondent's treatment of employees could also be damaging, even if it is only given to employees, because you would have "the potential for some kind of an indirect impact." The impact of these documents would, Seiders concedes, absolutely depend on how many people are exposed to them, but, according to Seiders, the documents could potentially affect Respondent's bottom line.

VI. Respondent's Property Rights

Several of Respondent's stores are leased and many of these leased stores are located in shopping centers where they share parts of the shopping center space with other tenants. The rights the tenant has to the store space and the areas outside its stores are delineated in the leases. What rights Respondent has as a tenant under these leases to the property the landlord has leased it is a critical part of this case, since Respondent has the burden of proving that, at every one of its leased store locations, it enjoyed a property right (interest) sufficient to give it the legal right to exclude union agents and others from its store locations. If Respondent did not have a sufficient property right, its conduct in excluding union agents and employees from its store locations will be found to be in violation of the Act. Therefore, it is the leases and, as will be discussed below, Massachusetts real estate law, that governs whether or not Respondent can establish that it had a sufficient property right in its leased premises to exclude union solicitors and others from those premises. It is submitted that, as will also be discussed below, Respondent cannot meet this burden.

The leases for the locations in dispute are generally structured the same way. Jt. Exhs. 1(b)-(k), 2, 5(a)-(d). The property that each landlord has given Respondent possession of is described in the demised premises provision of the leases. The demised premises always includes the space inside Respondent's stores. The leases also provide the tenants, including Respondent, with rights to areas outside the stores, and these rights are generally found in the common area provisions of the leases. The right described in the common area provisions of the leases in issue is a nonexclusive right to use the areas outside the stores in common with others. Generally, these so-called common areas include such things as the parking lot, sidewalks, passageways, landscape areas, service areas, and the loading areas. Jt. Exh. 1b-1j, Jt. Exh. 2, Jt. Exhs. 5a-5d.[95] Respondent, like the landlord's other tenants, does not take possession of any of the areas included in the common areas. The leases generally define what classification of individuals are permitted to use the common areas and these usually include the lessee, the lessor, its tenants, together with customers, invitees, and employees. All of the leases, whether express or implied, include a covenant of quiet enjoyment, in which the landlord promises that the tenant "shall lawfully, peaceably and quietly have, hold, occupy and enjoy the Premises…." See e.g., Jt. Exh. 1d, p. 57. Some of the leases also include self-help provisions by which one party to the lease can take action against the other party to the lease for violations of the lease, but none of these provisions allow a party to take such action without first giving notice to the other party, and none allow a tenant to maintain a trespass action to evict an unwelcome visitor.

A. The Expert Witnesses

Respondent and the General Counsel differ on whether expert testimony is appropriate in this case. Included in the lengthy record are the arguments each party made to the Board concerning this issue. Basically, it is General Counsel's position that the question of what property rights Respondent had at its store locations is a matter of legal analysis and, therefore, not a matter for experts. It is also General Counsel's position that the testimony offered by the experts did not include relevant facts, but, even if it did, the testimony they offered

[95] While there are some differences in the leases regarding what is considered common areas, not one of these leases includes the parking lot in the demised premises. Some of these differences in the leases will be addressed below.

supported General Counsel's theory of the law in this case. Thus, it is General Counsel's position that, at certain locations where it excluded union solicitors, Respondent cannot meet its burden to show that it had a sufficient property right in the common areas to exclude them.

The Experts Agree On the Key Points

Respondent and General Counsel each called as expert witnesses lawyers who practice real estate law in Massachusetts. Both attorneys are accomplished attorneys who have practiced real estate law for several years. While the two attorneys had some differing views on the leases and on applicable Massachusetts law, on the critical points there are no conflicts.

a. Respondent has possession and control inside the stores, but does not hold possession or control of the common areas. Rather, in the common areas, Respondent has only a right of use in common with others.

Respondent's expert, Attorney William Hovey, and General Counsel's expert, Attorney Robert Hoffman, each testified that it is in the demised premises portion of the leases where we find what property Respondent has exclusive use or possession of. Both also agree that in this case, the landlords gave Respondent possession of the inside of the supermarkets. The experts also agree that with respect to the inside of the store, Respondent controls who enters the store. Both experts also have the same general views of the common area provisions of the leases. Each described the common area provision as the provision in the lease where the landlord and the tenant set out the rights of the tenant to use, in common with others, areas outside its store, generally including areas such as the parking lots and sidewalks. Neither expert believed that this right of use was a possessive right. Both experts also essentially agreed that it was the landlord who retained control of the common areas. [96] Both witnesses also agreed that even if the lease provided that a tenant had responsibility for maintenance in the common area, this does not change who maintains control of that area.[97] Attorney Hoffman explained that when the landlord gives the tenant the right to use the common areas, it is not giving up the right to control them.

b. There was no conflicting testimony concerning who could bring a trespass action in Massachusetts.

Only Attorney Hoffman testified about who could maintain a trespass action in Massachusetts and he testified that Respondent has no standing to do so with respect to the common areas in its leases. While Attorney Hovey testified that the union solicitors were

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[96] Attorney Hovey danced around this issue for reasons that became apparent when, as will be discussed, Attorney Hoffman testified about the trespass law in Massachusetts. On several occasions in his testimony, Attorney Hovey conceded that the landlord controlled the common areas, but at other times he would try and take that back. For example, after admitting the landlord in the Marshfield lease controlled the parking lot, he later stated that the landlord's control was limited. After that, in talking about the Ipswich lease, at first when he was asked whether the landlord retained control in the parking lot, he said he might disagree with the word control and instead use the word responsibility, but then he agreed that "control is not inaccurate." Later, Attorney Hovey again vacillated on the word "control" and, when asked about the MIT lease, though he had not read the parking garage lease, when asked whether the landlord had the right to control common areas, Attorney Hovey testified that the word control is a very strong word and does not apply to the relationship of the landlord to the tenant.

[97] When asked specifically about the language in the Revere lease, Jt. Exh. 5(b), Attorney Hoffman reviewed the maintenance provision, which included language that the tenant will keep the common areas in good condition, "including restriping, repaving, policing, lighting and keeping it free of snow and ice," and testified that this provision was simply about maintenance of the common areas, and had no impact on who was in control of those areas.

technically trespassers, he was never asked and he never testified as to who it was that could maintain a trespass action against them.[98] Attorney Hoffman testified that a solicitor would not be considered a trespasser until he has received notice from the owner or person in control of the property that he has no right to be on the property. Attorney Hovey did not testify about the fact that there is a criminal statute in Massachusetts or about the issue of control generally. Attorney Hoffman did testify about the criminal and civil trespass law in Massachusetts and who has standing to maintain such an action. He also identified the Massachusetts criminal trespass statute, M.G.L. 266 s. 120. Attorney Hoffman testified that Respondent would not be allowed to maintain such an action in Massachusetts against parties it believed should not be in the common areas, since both the criminal statute, which expressly refers to the person "who has lawful control," and Massachusetts common law, would require the person in "lawful control" of the premises to maintain a trespass action. Based on the "lawful control" requirement, Attorney Hoffman explained that the police would not be justified in removing a union solicitor from the common areas of the leased property if it is Respondent, the tenant, who called the police. Respondent, as the tenant, does not have the right to do that, since it is not in lawful control of the common areas. Attorney Hoffman explained that because the tenant does not have lawful control of the common areas, even if the parties coming onto the common areas are union solicitors, trying to enlist Respondent's employees into joining a union, something Respondent does not want, it still cannot call the police and have them removed. This is true even if Respondent perceives that the solicitors are doing something that could directly impact the success of their business. The only circumstance where the police would be justified in removing an individual from the common areas of Respondent's stores without the person in "lawful control" first notifying the individual not to come onto the property would be if there is some kind of public safety problem. This is not a matter of trespass law, as anybody could make that call to the police and the police would be acting in their function of protecting public safety (rather than enforcing private property rights). Attorney Hoffman further explained that one reason the landlord retains control of the common areas is a matter of common sense. Where there are multiple tenants, there would be total disorder if the tenants had to vie with one another about who was in charge of the common areas. For example, if there is a difference of opinion among the tenants as to what kind of conduct or use is going to be permitted in the common areas, they would be at war with each other and the landlord over this dispute. Indeed, as will be discussed below, the experts disagreed on whether people who come to socialize at the mall, should be permitted in the common areas.

c. The expert witnesses agree that Respondent does have a remedy against the landlord.

Attorneys Hovey and Hoffman both described the covenant of quiet enjoyment included in the leases. Attorney Hovey explained that the covenant of quiet enjoyment is the provision of the lease in which the landlord covenants that if the tenant pays the rent, the tenant will peaceably use and enjoy the premises.[99] Similarly, Attorney Hoffman explained that the tenant is entitled to conduct its business without unnecessary or unruly interference which would have a negative effect on the conduct of his proper and agreed-upon activities. Both witnesses agreed that if a tenant believes that this covenant has been violated, the tenant may take remedial action against the landlord by filing a complaint. This is an action the tenant can take

[98] Attorney Hovey testified that the tenant "would have the right to call the police to have the third party in the common area removed and if that didn't work the tenant could contact the landlord and the landlord in my view would have an obligation to take steps to remove this person."

[99] Attorney Hovey testified that the landlord covenants that the tenant will peaceably use and enjoy the demised premises; presumably he meant to say the premises in general.

against the landlord. This cause of action has nothing to do with who controls the common area for purposes of the trespass statute.[100] Attorney Hoffman, who testified that he reviewed every lease in its entirety, something Attorney Hovey admitted he had not done,[101] testified that a number of these leases also include self-help provisions. If the tenant feels the lease has been violated, it would first have to notify the owner and give the owner an opportunity to fix the problem before it could take some action on its own. The action the tenant could take does not include filing trespass actions. Attorney Hovey did not testify about self-help provisions.

d. Respondent does not contest Attorney Hoffman's testimony that a Massachusetts court will not enforce a trespass action against union solicitors, even if it retained the right to evict the trespassers from the landlord, if there is a Federal law that prohibits Respondent from barring them.

Attorneys Hovey and Hoffman both offered testimony concerning what impact Respondent's letters to its landlords, seeking the right to remove union solicitors, had on the right to evict people from the common areas. While they disagreed about what to call these letters, they both agreed that the letters would give Respondent the authority to initiate a trespass action in the common areas. They both view these letters as an agency authorization, allowing the tenant to enforce the landlord's rights.[102] Attorney Hovey thinks the agency authorization is an amendment to the lease, while Attorney Hoffman does not. Attorney Hoffman views the letters as giving the tenant authority which the landlord can later revoke. He testified that in his experience, a tenant would not seek a right through these letters it already had under the leases.

Attorney Hoffman was asked whether there would be circumstances under which a Massachusetts court would find these letters to be unenforceable. He was asked by the ALJ, "If there was a federal law or a federal ruling that holds that Union solicitors can come out into the common area and solicit peacefully, then would these letters give Shaw's or Star Market the right to," but before the question was finished, Respondent's Counsel added "If it's useful, Your Honor, we don't contest that. If the law is such that it says that you can't permit people, you can't bar people from coming on that property, then the letter can't give you that right." At that point, Attorney Hoffman stated "That's exactly what my answer would be to that question."

e. There were some subjects, unrelated to Respondent's right to eject others from the common areas, on which the experts did not agree.

While, for the most part, the expert witnesses agreed about who enjoys the right of use in the common areas, there were some differences in their views. They testified that third parties permitted to be in the common areas are limited to those spelled out in the lease provision, so that if a party is not included within the list, that party is not invited to use it.

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[100] While Attorney Hovey was willing to testify that the actions of the union solicitors in this case would violate the covenant of quiet enjoyment, it was because of their presence and not because of their message or impact on the business. Attorney Hoffman said that what conduct violates the covenant is a judgment call. Regarding the question of whether the landlord can permit others on the property if the others are going to adversely affect the sales of the grocery store, Attorney Hoffman explained that this is a matter for a court to decide.

[101] Attorney Hoffman limited his review to certain articles of the leases that he thought would be the critical articles for his testimony.

[102] Attorney Hovey testified generally that many landlords of shopping areas maintain policies with regard to third party solicitation on mall property, especially in the common areas.

Attorney Hovey had a narrow view of who is included in these groups, while Attorney Hoffman's view was more expansive when discussing business invitees. Attorney Hovey testified that he thinks people who come to the mall to socialize, without the intent to buy something, are trespassers. He believes this is the case, even if the intent of the person in the common area talking to someone cannot be demonstrated beyond a reasonable doubt. He testified that he hoped a Massachusetts court would find someone guilty of trespass, even if all that is happening is that there is a person in the parking lot talking to someone, although he had no cases or statutes to support this point. He continued with this reasoning and testified that if an individual came to a shopping center to talk to someone, and saw something he liked and bought it, that person would be an invitee and a trespasser. He testified that such a person would have a dual status. Attorney Hovey testified that he hoped a Massachusetts court would find this person guilty of trespass. Attorney Hoffman, on the other hand, testified that because the landlord retains control of the property, the determination as to whether someone fits neatly into the categories included in the leases is the landlord's to make. He also testified that the landlord has invited the public generally to come to the retail shopping center and, therefore, some kind of conduct must occur after a person comes onto the property in order for the landlord to invoke its right to exclude people.[103] Attorney Hoffman expressed the view that so-called mall walkers and people socializing are invited onto the mall premises, as part of the landlord's invitation to the public. After that, if the party invited onto the property engages in conduct in conflict with this invitation, the landlord may take action to exclude this person. This decision, about whether a person in the common areas violates the invitation, is a matter for the landlord to decide and, if the tenant disagrees with that decision, the tenant can sue the landlord. Ultimately, the difference between the two expert witnesses is that Attorney Hovey believes the covenant of quiet enjoyment is violated if a party the tenant believes is not included in the categories of people invited onto the common areas is present, while Attorney Hoffman believes the landlord must make the decision regarding who is allowed, and then it is a matter of judgment. This difference of opinion does not have any impact on the determination as to who controls the common areas and who can maintain a trespass action in Massachusetts.

VII. Legal Conclusions

A. Respondent violated Section 8(a)(1) of the Act by Prohibiting Nonemployee Union Representatives of the UFCW and IBEW Access to Engage in Activities Protected by Section 7 of the Act outside its stores.

In cases involving union solicitation and distribution on private property, a balance is struck between the competing organizational rights of employees protected under Section 7 of the Act and the private property rights of property owners "with as little destruction of one as is consistent with the maintenance of the other." *Lechmere v. NLRB,* 502 U.S. 527, 534 (1992) citing *NLRB v. Babcock & Wilcox*, 351 U.S. 105, 112 (1956). In striking that balance, a distinction is drawn between the organizational activities of employees as opposed to those of nonemployees. Employees of an employer are granted a broad right of access to an employer's private property to discuss and pursue amongst themselves the right to organize. Thus, as to employees, an employer cannot prohibit its own employees from engaging in union solicitation on its property during nonworking time, nor may it prohibit its own employees from distributing union literature on its property during nonworking time in nonworking areas, unless it can demonstrate that special circumstances exist justifying the ban. *Republic Aviation Corp. v.*

[103] Attorney Hoffman testified that many of the leases include a percentage rent provision whereby the tenant's rent is measured in part by gross sales and that percentage rent is something which would encourage the landlord to promote the tenants and greater sales.

NLRB, 324 U.S. 793, 803 (1945). The same broad right of access to private property for organizational activity is not, however, afforded to nonemployees. Thus, as to nonemployees, an employer may validly prohibit nonemployees from engaging in union solicitation and distribution of union literature on its private property, provided that there are reasonable alternative means for the union to communicate its message to employees, and the employer's prohibition does not discriminate against the union by allowing other solicitation and/or distribution. *Babcock & Wilcox*, supra., *Lechmere*, supra. Thus, absent discrimination, unless "the location of a plant and the living quarters of the employees place the employees beyond the reach of reasonable union efforts to communicate with them," an employer may prohibit nonemployees access to its property. *Babcock & Wilcox*, 351 U.S. at 113.

In cases involving the issue of whether an employer has violated Section 8(a)(1) of the Act by prohibiting nonemployee union representatives from engaging in Section 7 activity outside its business, given the narrow right of access nonemployees have to an employer's private property under *Lechmere* and *Babcock & Wilcox*, the battleground is generally over: a) whether the employer can meet its threshold burden of establishing that, at the time it excluded nonemployee union representatives, it had a property interest that entitled it to exclude individuals from the property – because, as will be discussed in further detail below, failing to do so will mean there is no conflict between property rights and Section 7 rights necessitating a *Lechmere* and *Babcock & Wilcox* analysis;[104] and b) whether the employer's prohibition against access for nonemployee union representatives is discriminatory, in that the employer allows other nonemployee groups access to solicit and/or distribute.

The battleground in this case is no different. The General Counsel does not take the position that Respondent's refusal to allow nonemployee representatives of the UFCW and IBEW access to areas outside its stores to engage in activities protected by Section 7 of the Act is violative because there are no reasonable alternative means for them to communicate their message to employees under *Lechmere* and *Babcock & Wilcox*. Rather, it is the General Counsel's position that Respondent's conduct directed at the nonemployee union representatives violates Section 8(a)(1) of the Act for two reasons: a) it is discriminatory, in that it denied the nonemployee representatives of the UFCW and IBEW access to the outside areas of its stores while allowing other nonunion solicitations and distributions to occur in those areas; and b) at some store locations, it is not grounded on a sufficient property right, in that Respondent failed to meet its threshold burden of demonstrating that it had a sufficient property right to exclude the nonemployee representatives from the common areas outside those stores.

1. The Nonemployee UFCW and IBEW Representatives were Engaged in Protected Activity Outside Respondent's Stores

The record clearly establishes that the nonemployee representatives of the UFCW and IBEW were engaged in activities that were protected by Section 7 of the Act when they engaged in solicitation and distribution outside of Respondent's stores.

a. The UFCW Campaign

It is undisputed that the UFCW was engaged in an organizational campaign when it sought access to the outside areas of Respondent's stores. Thus, for almost three years, nonemployee UFCW representatives have attempted to organize Respondent's employees by talking to them outside Respondent's stores and handing them authorization cards and various

[104] *Wild Oats Markets, Inc.*, 336 NLRB 179, 180 (2001); *Bristol Farms, Inc.*, 311 NLRB 437, 438 (1993).

other leaflets comparing benefits that Respondent's unionized employees receive with those benefits employees in the unorganized stores receive. It can hardly be argued that this activity is not protected by Section 7 of the Act.

Respondent attempted to show that the UFCW engaged in misconduct during this campaign in an apparent attempt to argue that this alleged misconduct justifies Respondent's banning nonemployee representatives of the UFCW from the outside areas of its stores. Any such argument should be rejected. First and foremost, there is no reliable evidence that any UFCW representative impeded customer access to the stores or in any significant way interfered with Respondent's operations.[105] Second, Respondent offered testimony from a handful of witnesses who testified about what, in their opinion, were unpleasant encounters they had with the nonemployee UFCW representatives. In some cases, the testimony they offered about a particular encounter was not particularly reliable.[106] In any event, the incidents they testified about – which generally involved nonemployee UFCW representatives speaking to them when they were asked by the employee not to, and the use of vulgar language – were, by their own admission, isolated, given the fact that they had seen the UFCW representatives outside their stores on many other occasions without incident. Indeed, as Patrick Connors testified, during the period July 2001 to September 2002, the nonemployee UFCW representatives visited at least 30 of Respondent's stores on at least 2000 occasions. That theses incidents are isolated occurrences is also supported by the fact that Respondent was only able to come up with a handful of incidents, even after soliciting its employees to report them to management in its November 16, 2001 letter to associates. In addition, the incidents that Respondent provided evidence about, on the whole, can be fairly characterized as annoyances, and, given the sporadic manner in which they occurred, they would not justify Respondent's banning access to the nonemployee IBEW and UFCW representatives. See *Stark and Van Til Supermarkets*, 340 NLRB No. 172, slip op. at 5 (2004) (customer complaints which involve a variety of sporadic annoyances by picketers, including the use of vulgar language and blockage of store entrances, not sufficient to justify a ban on picketing and handbilling).[107] Third, although as Patrick Connors testified, the UFCW enlisted other community organizations to support its organizing efforts, there is no reliable evidence linking the UFCW with any of the distribution or protest activities these groups engaged in, which, in any event, may be protected free speech. Additionally, there is no evidence that the UFCW advocated the positions of these other groups.[108]

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[105] As stated above in the Fact section of this decision, the offer of proof as to Zajko should be rejected. Although there was some limited evidence that on three occasions, UFCW representatives approached Respondent's employees outside the stores while they were working (testimony of Farino and offer of proof as to William Tennermann, Robert Kapsidis), these events were isolated at best.

[106] For example, Risitano testified that his knowledge that the individual he had an encounter with was associated with the UFCW was based on what his manager told him, and he was also obviously confused as is evidenced by his further admission that he did not know what was going on.

[107] The fact that the UFCW representatives may have gone inside the stores at the initial stages of the campaign, would not justify a complete ban on solicitation and distribution outside the stores. Based on Patrick Connors' unrebutted testimony, the inside the store conduct by the nonemployee UFCW representatives was limited to the first months of a campaign that has lasted almost three years. Moreover, no witness indicated that the in store conduct played any part in Respondent's decision to exclude the UFCW representatives from the outside common areas. *Price Chopper*, 325 NLRB 186, 188 (1997), enfd. 163 F3d 1177 (10th Cir. 1988).

[108] For example, there was no testimony surrounding the circumstances involving the photograph that is Respondent's Exhibit 81, depicting a woman wearing a UFCW shirt holding a Jobs for Justice sign standing next to a person holding a sign that says Safe Foods-Shoppers Unite-Worker Rights. Similarly, with respect to the Jobs for Justice literature that is Respondent's Exhibit 8 and 8(a), Respondent attempted to link the distribution of this literature to the UFCW with Nadworny's testimony that the documents were distributed outside Respondent's inner city Prudential Center store at a time when there were UFCW representatives present. Nadworny's testimony that

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The Respondent also submitted evidence of a "shop in" that occurred at the Falmouth store shortly after it opened in September 2001, in an apparent attempt to argue that this event justifies banning union solicitation/distribution outside of its stores. Although those that participated in this event all wore shirts provided to them by the UFCW bearing a message of support for Respondent's employees, there is no evidence that even suggests that they conducted themselves in any manner inconsistent with that of other patrons to the store. In other words, they shopped. There is no evidence that they were actively soliciting Respondent's employees or interfering with their ability to work or that they were distributing materials. Nor is their any evidence that they disrupted or interfered with the ability of other patrons to shop. Nor did Respondent file an unfair labor practice charge against the UFCW to challenge the legality of their conduct.

Similarly, Respondent would not be justified in banning access to the outside of its stores because of the activities depicted in Respondent's Exhibits 71 and 80 where McClay and others were holding placards outside of the Newtonville store. Again, there is no evidence to suggest that the activity was anything other than peaceful, and as McClay testified, Respondent's customers were able to freely pass by them. In addition, Respondent did not file a charge against the UFCW to challenge the legality of this activity. Like all of the other alleged misconduct, there is no evidence even suggesting that Respondent's decision to ban access to the outside areas of its stores was based on this conduct. Respondent cannot now rely on it to justify it actions. *Price Chopper,* 325 NLRB at 188.

b. The IBEW Campaign

The IBEW campaign involved area standards handbilling in the outside areas of four of Respondent's stores. It is well settled that a union's peaceful area standards customer boycott handbilling is protected by Section 7 of the Act. *Edward J. Debartolo Corp. v. Florida Gulf Coast Building and Construction Trades Council*, 485 U.S. 568 (1988). In cases where the issue is whether the asserted area standards activity is statutorily protected, the Board normally does not look beyond the communication that the union is conveying to customers. Accordingly, if the message the union is communicating in its handbill indicates that an employer is undermining the collectively bargained wage and benefit standards in the area, and if the union's conduct in conveying its message is peaceful and consistent with the nature of the message, i.e., the activity is ostensibly in support of area wage and benefits standards, the union's activity is prima facie protected. *Victory Markets, Inc.*, 322 NLRB 17, 18 (1996); *Food For Less*, 318 NLRB 646, 648 (1995). At that point, it is the employer's burden to show that the union's activity is not what it appears to be, and is outside the sphere of Section 7 protection. To do this, an employer may try to show that its wage and benefit package are not substandard, and/or that the handbills were false in some other significant way, and that the union was aware or should have been aware of any such falsehoods. *Victory Markets*, supra.

Applying this analytical framework to the instant case, the handbills and corresponding gift cards that the IBEW distributed in the outside common areas of Respondent's stores bear a clear area standards customer boycott message. Respondent has also stipulated that the handbills and corresponding gift cards were peacefully distributed. As such, the IBEW's handbilling was prima facie protected by Section 7 of the Act.

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the leaflets were being distributed outside the store was, however, based on hearsay and Nadworny was unable to offer any definitive evidence that UFCW representatives distributed it, as opposed to representatives of Jobs for Justice or some other non-UFCW group mentioned on the document. Nor was there any evidence showing whether the distribution of the document took place on private or public property.

Respondent has not established that the message conveyed in the IBEW's handbill was false and that the Union knew or should have known it was false. Rather, the evidence establishes that when the IBEW learned that Respondent was using Commercial Electric to perform work at its stores, it sent Commercial a letter and questionnaire the purpose of which was to determine whether Commercial was in compliance with community standards. The undisputed record evidence is that Commercial failed to respond to the IBEW's inquiry. In addition, the IBEW provided Respondent with a copy of the handbill prior to distributing it, asking for Respondent's input as to any objections they had to it. Respondent admits it never responded. Under these circumstances, it cannot be said that the message conveyed in the handbill was false and that the IBEW knew or should have known it was false. In fact, Respondent never challenged the lawfulness of the IBEW's handbilling by filing an unfair labor practice charge or by presenting any evidence concerning Commercial's wage and benefit package.

Respondent appears to argue that the IBEW's handbilling is unprotected because the IBEW's objective is to obtain Respondent's agreement to have all of Respondent's electrical work performed by union contractors. First, Respondent has not presented any evidence that the IBEW is demanding that Respondent give union contractors all of this work. At most, what the record demonstrates is that, given what transpired in its negotiations with Respondent's general contractor, Marathon Construction, to use a union contractor, Aldon Electric, on one of Respondent's work sites (where Marathon agreed to use Aldon, but Respondent refused to give the work to them), the IBEW did not believe that union contractors were given a fair opportunity to obtain Respondent's work. Even assuming, without conceding, however, that the IBEW's objective in its area standards handbilling was to obtain Respondent's agreement that it would use only union contractors, that object is not inconsistent with the tenets of *Debartolo* and would not make the handbilling any less protected. See *Plumbers Local 32 (Ramada, Inc.)*, 302 NLRB 919 (1991)(threat to handbill and organize a boycott of neutral employer in furtherance of its primary labor dispute did not violate the Act.).

Respondent also appears to argue that the messages that the IBEW displayed on its electronic billboard outside its offices, and other documents that the IBEW has distributed to its members, also justify Respondent's ban of the IBEW's otherwise peaceful area standards, customer boycott handbilling. It is evident from the record that all these communications fall within the ambit of protected free speech, and there is no evidence that the messages that Respondent now complains about were false, let alone any evidence that the IBEW knew or should have known they were false. Indeed, Respondent did not challenge any of these activities by filing an unfair labor practice charge or pursuing any other legal action. In any case, none of this evidence is relevant to show whether the handbills themselves are protected under Section 7 of the Act, the only relevant inquiry.

2. Respondent's Solicitation Policy Discriminates Against Union Solicitation in violation of Section 8(a)(1)

As stated above, under *Babcock & Wilcox*, an employer may not discriminate against nonemployee union solicitation and distribution by prohibiting it while allowing other solicitation and distribution. This concept is sometimes referred to as the discrimination exception. In cases involving the discrimination exception, the Board has held that an employer does not violate the Act if it permits a small number of isolated beneficent acts as narrow exceptions to a valid no solicitation/no distribution rule. In determining whether certain beneficent acts establish unlawful discrimination, the Board will examine the "quantum of incidents" involved. *Hammary Manufacturing Corp.*, 265 NLRB 57, fn. 4 (1982). The Board will find discrimination where the

incidents of charitable solicitation occur frequently and over an extended period of time. *Be-Lo Stores*, 318 NLRB 1, 11 (1995), enf. denied in relevant part 126 F.3d 268 (4th Cir. 1997). There is no dispute here that in prohibiting nonemployee UFCW and IBEW representatives from engaging in protected acts in areas outside its stores, Respondent is relying on a corporate-wide solicitation/distribution policy that is discriminatory on its face, inasmuch as it permits solicitation and distribution for charitable purposes that Respondent believes will be of benefit to its customers and enhance its relations within the community served by the store. The record clearly establishes that the beneficent acts allowed by Respondent at its stores are extensive and not isolated. The record evidence demonstrates that since at least June 1, 2001, throughout the UFCW and IBEW campaigns, Respondent has permitted all kinds of charitable and civic solicitation and distribution. Consequently, Respondent's attempts to deny nonemployee representatives of the UFCW and IBEW, engaged in protected union solicitation and distribution activities, access to the areas outside ***all*** of its stores listed in Paragraph 2(b) of the Third Amended Consolidated Complaint, including those located in Harwich, Marshfield, Orleans, Yarmouth, Norwood, Ipswich, Franklin, MIT, Hyannis, Gloucester, Mansfield Revere, Medford, Weymouth, Melrose, and Falmouth, by asking them to leave those areas and by calling the police to have them removed if said nonemployee representatives refused to leave voluntarily, on the dates referred to in Joint Exhibits 1, 3 and 4, violated Section 8(a)(1) of the Act. *Albertson's, Inc.*, 332 NLRB 1132 (2000), enf. denied in relevant part 301 F. 3d 441 (6th Cir. 2002); *Sandusky Mall Co.*, 329 NLRB 618 (1999), enf. denied in relevant part 242 F. 3d 682 (6th Cir. 2001); *Riesbeck Food Markets, Inc.*, 315 NLRB 940 (1994), enf. denied in relevant part 91 F. 3d 132 (4th Cir. 1996). Similarly, Respondent's attempts to limit nonemployee UFCW representatives' access to the outside areas of its Mansfield store that are at least 75 feet from the store, where no such restriction is placed on permitted nonemployee solicitors, and its further attempts to prohibit such access completely through the issuance of no trespass notices, also violate Section 8(a)(1) of the Act.[109]

Not only is Respondent's solicitation policy discriminatory on its face, there is ample evidence in the record that establishes that Respondent is using the rule simply to target unions and union activities for adverse treatment.[110] In this regard, the record shows that Respondent changed the language of its solicitation policy to its current form in January 2002, just as the UFCW campaign intensified and began to focus its solicitation and distribution efforts in the areas outside Respondent's stores. Prior to January 2002, Respondent's solicitation policy for nonemployees made no overt distinction between charitable and civic and other nonemployee

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[109] Any argument that Respondent's calling the police did not violate Section 8(a)(1) of the Act because Respondent was motivated by some reasonable concern involving public safety or the interference with legally protected interests should be rejected. This is not a case where an employer is calling the police simply to report a legitimate concern without seeking any particular action by the police. *Nations Rents, Inc.*, 342 NLRB No. 19 (2004)(employer did not violate Section 8(a)(1) of the Act in calling the police to look into whether picketers were trespassing on its property, monitoring a police scanner, and following employees home). Rather, as Respondent admits, it was calling the police to have them take the specific action of removing the nonemployee UFCW and IBEW representatives from the outside areas of its store. *CSX Hotels, Inc.*, 340 NLRB No. 92 (2003), enf. denied ___ F.3d ___, 2004 WL 1657343 (4th Cir. 2004).

[110] The fact that Respondent is using its nonemployee solicitation/distribution rule to target unions and union activities for adverse action distinguishes this case from the Fourth Circuit's decision in *Riesbeck Food Markets* upon which Respondent relies. In *Riesbeck*, the Board determined that the employer violated Section 8(a)(1) of the Act by prohibiting a nonemployee union representative from engaging in informational picketing and handbilling near the customer entrances of its store pursuant to a no distribution /no solicitation policy that permitted extensive civic and charitable solicitation. 315 NLRB at 941. In denying enforcement of the Board's order, although the Fourth Circuit did find that there were times an employer could reasonably distinguish between solicitations that encourage its business and those which do not, the court suggested that an employer could not make such a distinction to prohibit union solicitation if, as in the present case, there was evidence that the employer's solicitation/distribution policy or its practices expressly discriminated against the union. 91 F.3d 132, slip op. at 10.

solicitations. Yet once the UFCW's campaign intensified, Respondent reacted by rewriting the policy to resemble those that the Fourth and Sixth Circuit Courts have passed on approvingly in *Riesbeck Food Markets*, *Sandusky Mall* and *Albertson's*. The timing surrounding the implementation of the new rule suggests it was done in direct response to the UFCW's organizing efforts. That the rule is being used to target union activities for adverse treatment is further evidenced by the fact that Respondent does not limit permitted solicitations and distributions to those that are charitable and civic in nature. For example, at the Salem store, Respondent allowed a private exercise company to distribute leaflets to promote its business. Similarly, at the Peabody store, Respondent allowed a private film making company to engage in fundraising by soliciting money from Respondent's customers. At the West Roxbury store, Respondent has allowed a private motorcycle riding group to solicit. The record also demonstrates that Respondent commonly allows radio stations to promote themselves in front of its stores through the distribution of station giveaways.[111] Finally, Respondent allows the public to engage in private solicitation at its stores. As Respondent's witness Carol Kearney testified, there is a bulletin board in the vestibule of Respondent's South Yarmouth store for the public to post notices on.

Also indicative of the fact that Respondent is using its solicitation policy to target the unions and union activities for adverse treatment is Nadworny's testimony that the IBEW would not be allowed access to solicit for the Jimmy Fund because the IBEW was neither a charitable nor civic organization. Yet the record demonstrates that at the Falmouth store, Respondent allowed the Cape Cod Curling Club, a private group of curling enthusiasts, to solicit for the Habitat for Humanity.[112]

The fact that Respondent does not uniformly apply its rule even as to charitable and civic organizations further demonstrates that Respondent is using the rule to target unions and union activities for adverse effect, since they are the only group to whom Respondent appears to uniformly apply the rule. Thus, there are numerous examples in the record where Respondent has allowed a charitable or civic group to solicit at its stores more frequently than the rule provides. In addition, one of the reasons Respondent gives for denying nonemployees access to engage in union solicitation and distribution is that such solicitation and distribution is active and not passive, as required by the rule. Yet, as Sharon Fagon testified, her cub scouts were allowed to actively solicit Respondent's customers at its Auburndale Village/Newton store. The record also demonstrates that Respondent does not follow the requirements of the rule when it comes to the postering of the solicitation at its stores and the completion of release of claims

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[111] The promotional giveaways Respondent has permitted radio stations to conduct in front of its stores, which promote the station, as opposed to a product for sale in the store, are not of the same type that the Board found were permitted work related activities in *Rochester General Hospital*, 234 NLRB 253 (1978). In that case, the Board reasoned that blood drives, fundraising sales, and medical textbook and pharmaceutical displays allowed by a hospital employer were integrally related to its business and, as such, not evidence of a disparate application of a no solicitation /distribution rule such that it must permit access to its premises by nonemployee union organizers. In this case, although promotions by a juice company or a pickle company, or perhaps even American Express, may be work-related activities akin to those involved in the *Rochester General Hospital* case, the giveaways that the radio stations are permitted to distribute to promote themselves (as opposed to the product being sold by Respondent) are too far removed from, and not an essential part of, the business functions of the store. Thus, although advertising the products it has for sale would be a work-related activity, allowing the advertiser to promote itself is not related to the business of selling groceries.

[112] Interestingly, it is apparent based on his dissent in *Albertson's*, supra, that then Chairman Hurtgen would view Respondent's refusal to allow the IBEW to solicit on behalf of the Jimmy Fund as evidence that Respondent's policy is based on union considerations and, therefore, unlawful, because the line-drawing that Respondent is attempting to engage in between charitable/civic solicitations and distributions and all others is, in fact, an anti-union one. 332 NLRB 1132, 1137-38 (Hurtgen dissenting).

forms.[113]

It is important to note that, other than the written policy itself, there is no evidence that Respondent provides its local store managers with any training or information about how to apply the policy, except that union activities are not permitted. Thus, when the UFCW started its campaign, store managers were given specific instructions on what to do if union representatives came around to their stores. According to Nadworny, these instructions were consistent with those contained in the August 8, 2001 written directive authored by Cindy Garnett, that union representatives were not to be in the store or in the parking lot, that they had to conduct their business in public areas off the premises, and that if union solicitors refused to move when asked, the police should be called. There is no evidence that any such written directives or instructions are given to store managers pertaining to other types of solicitations or distributions, whether or not permitted under the policy. In addition, on November 16, 2001, Respondent solicited its employees to report incidents of union solicitations that they considered to be harassing or intimidating. There is no evidence, however, that Respondent has solicited its employees to report incidents of nonunion solicitation or distribution that it believes are not permitted by its policy. Moreover, the very fact that Respondent sent out such a notice to employees was designed to suggest to employees that they were likely to find union solicitations to be harassing or intimidating, thereby tainting their employees' reaction to such solicitation even before they had experienced it. It is clear, therefore, that the only uniformity Respondent demands of its store managers in applying its solicitation/distribution policy is that they prohibit union solicitation, further establishing that Respondent's policy targets union activities for adverse treatment. *Food Lion, Inc.*, 304 NLRB 602 (1991).[114]

Respondent argues that permitting charitable and civic solicitations to occur outside its stores does not warrant a finding that it is unlawfully discriminating against the UFCW and IBEW in denying them access to solicit and distribute pursuant to the discrimination exception articulated in *Babock & Wilcox*. Respondent argues that an employer should be allowed to distinguish between solicitations and distributions that enhance its business and those that hurt its business. In this regard, Respondent maintains that the charitable and civic solicitations and distributions it permits are good for business, and the mere fact that it allows that kind of solicitation/distribution does not mean it must allow the UFCW and IBEW similar access, which it asserts is bad for business.

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[113] Any assertion by Respondent that these discrepancies are isolated should be rejected. It is evident that Respondent does not keep an accurate accounting of what solicitations and distributions it has allowed, given the scarcity of documents that were submitted as part of Respondent Exhibit 83, and given the testimony of one store manager, Joseph D'Angelo, who testified he could not locate any records of allowed nonemployee solicitation distribution at his store by prior managers. Consequently, it cannot be assumed that the discrepancies in the manner in which Respondent applied the rule are isolated or limited to those that came out in the hearing, or were revealed in Respondent's Exhibit 83. Indeed, Respondent did not even offer testimony that the only available records concerning allowed solicitations and distributions at its stores were those contained in Respondent's Exhibit 83. In fact, one witness, Sharon Fagon, testified that when she requested permission from Respondent for the cub scouts to solicit, the person she spoke with had to check the store's solicitation calendar. Nevertheless, Respondent did not offer one such calendar into evidence or explain its reason for not doing so.

[114] Like this case, the employer in *Food Lion*, supra, had an established procedure for certain groups seeking to solicit outside its store pursuant to which it regularly permitted charitable organizations to engage in solicitation and distribution. Conversely, the employer there specifically instructed its store managers and supervisors that they could and should keep nonemployee union representatives off company premises and should call local law enforcement officials if the union representatives resisted. In finding that the employer violated Section 8(a)(1) by denying nonemployee union representatives access to solicit off-duty employees in the common areas adjacent to its leased premises, the Board stated '[i]n light of Respondent's express instructions to its supervisors and store managers, it is clear that the Respondent has a blanket discriminatory policy of specifically denying union organizers – but not others – access to its "premises" and of calling the police if the union representatives resist eviction.' 304 NLRB at 604.

In support of this argument, Respondent relies on the marketing testimony of Difelice and Seiders. Although each of them claimed that allowing union solicitation and distribution could negatively affect Respondent's businesses, no evidence was presented to support that claim. For example, there is no evidence even suggesting that Respondent has endured an actual economic loss as a result of the activities of the UFCW and IBEW. Additionally, it appears from Difelice's testimony that even the charitable and civic solicitation that Respondent permits could have a negative effect on Respondent's business. Thus, Difelice admitted that customers may be uncomfortable and deterred from shopping at Respondent's stores since the groups that are permitted to solicit and the messages they convey may be considered controversial by some customers in much the same way she claimed unions are controversial when she explained why Respondent would be justified in denying them access.

The Board, in any event, has already rejected the arguments Respondent espouses here, having stated that an employer's practice of reviewing and evaluating each message sought to be disseminated and granting access only if, in its judgment, the solicitation would not adversely affect the employer's business, is unlawfully discriminatory vis-à-vis union solicitation. *Riesbeck Food Markets*, 315 NLRB at 941; *Sandusky Mall*, 329 NLRB at 621-22. As the Board in *Albertson's* recognized in noting that it is inconsistent with the protections of Section 7 for an employer to prohibit prounion solicitation on its property while at the same time allowing a wide variety of other types of solicitation, charitable or otherwise, "[a]n employer's judgment of worthiness of purpose cannot claim priority over the statutory guarantee provided for union solicitation." 332 NLRB at 1136 fn. 15.[115]

3. At the Falmouth, Harwich, Marshfield, Orleans, Yarmouth, Norwood, Ipswich, Franklin, MIT, Hyannis, Gloucester, Melrose, Revere, Weymouth, and Medford Locations, Respondent Cannot Meet Its Burden To Show It Had A Property Interest Sufficient To Exclude Union Solicitors From The Outside Of Its Stores.

As mentioned above, Respondent's solicitation rule and the way Respondent applied it to union solicitors violates Section 8(a)(1) of the Act. Moreover, at the above-listed store locations, Respondent violated Section 8(a)(1) of the Act for the additional reason that it excluded Union solicitors, when it had no property right on which to rely in excluding them, or anyone else for that matter, from these stores.[116] At these locations, Respondent had no right to exclude Union solicitors even if it had a proper rule, which it did not, because Respondent cannot meet its burden of showing that it had a sufficient property right to exclude the union organizers (or anyone else).

As discussed above, it is well established that an employer may properly prohibit solicitation/distribution by nonemployee union representatives on its property if reasonable alternative means of communicating with employees exist and if the employer's prohibition of nonemployee union representatives does not discriminate against the union by permitting others to solicit and distribute. *Wild Oats*, 336 NLRB at 180, citing *Lechmere* and *Babcock & Wilcox*.

[115] Along these lines, Defelice testified that any kind of activity that creates uncertainty in the minds of customers may deter them from patronizing a store. She acknowledged that a gathering of a few individuals with a policeman could create such an uncertainty. Thus, Respondent's own actions in bringing the police to its stores to evict union solicitors creates the very uncertainty that Respondent seems to complain the union's solicitors are causing by their peaceful, unobtrusive solicitation and distribution activities.

[116] For the remainder of this section, "stores" will refer only to the stores identified in the above heading.

This precedent, however, presupposes that the employer excluding the nonemployee union representatives possesses a property interest entitling it to exclude other individuals from that property, since in the absence of such a showing, there is no conflict between competing rights requiring an analysis and an accommodation under *Lechmere*. *Food For Less*, 318 NLRB 646, 649 (1995).

It is for this reason that, when there is a purported conflict between the exercise of rights guaranteed by Section 7 of the Act and private property rights, an employer charged with denying union access to its property must meet a threshold burden of establishing that it had, at the time it expelled the union representatives, a property interest that entitled it to exclude individuals from the property. *Id*. If the employer excluding union representatives cannot meet this burden, then there is no actual conflict between private property rights and Section 7 rights and the charged employer will be in violation of Section 8(a)(1) of the Act. *Id*. The Board determines the nature of the charged employer's property interest by examining relevant record evidence, including lease language, in conjunction with the law of the state in which the property is located. *Wild Oats*, supra at 180, citing *Food For Less,* supra at 649.

a. Respondent Has the Property Right Burden

It is very clear under Board law that Respondent has the burden of showing that it had a sufficient property interest to exclude the IBEW and UFCW solicitors from its property. *Wild Oats*, supra at 180, *Best Yet Market*, 339 NLRB No. 104, slip op. at 4 (2003). To meet its threshold burden, Respondent will have to show that it had a sufficient property interest in the stores' common areas[117] to expel the union solicitors from those areas. *Food for Less*, supra at 649. To determine whether or not Respondent can meet this burden, the Board looks at the relevant documentary and other evidence on the record and relevant state law. *Id*. at 648; *Best Yet Market*, supra.

b. Massachusetts law clearly permits only the party in possession of and/or legal control of the property to exclude others.

It is well settled Massachusetts law that "an action of trespass, being a possessory action, cannot be maintained, unless the plaintiff had the actual or constructive possession of the property trespassed upon at the time of the trespass." *Attorney General v. Dime Savings Bank of New York*, 413 Mass. 284, 288, 596 N.E. 2d 1013 (1992), citing *Emerson v. Thompson* 2 Pick. 473, 484 (1824). This common law principle is codified in the Massachusetts criminal trespass statute, which provides that:

> Whoever, without right enters or remains in or upon the dwelling house, buildings, boats or improved or enclosed land, wharf, or pier of another …. after having been forbidden so to do **by the person who has lawful control of said premises**, whether directly or by notice posted thereon….

M.G.L. 266 s. 120, GC Exh. 48 (emphasis added).

There is Massachusetts law concerning the concept of control. In *Nyer v. Munoz-Mendoza*, 385 Mass. 184, 187, fn. 6, 430 N.E. 2d 1214 (1981), the Massachusetts Supreme Judicial Court examined the question of whether the landlord or the tenant had control of the

[117] The common areas are defined in the leases, but generally include all the areas outside Respondent's stores, and are areas Respondent generally shares with other tenants in a shopping center.

outside of the tenant's door. In *Nyer*, the dispute was over the outside of the tenant's door, nobody questioned the landlord's control of the common areas. The Court noted that the definition of common areas found in H. Stavisky & R.A. Greeley, Landlord and Tenant Law, s. 713, at 473 (1977), was "any portion of the premises which are used by tenants in common." In discussing whether the tenant or the landlord controls the exterior of the tenant's door, the Court noted "In every case and authority surveyed where a landlord has been held to have control of doors or doorways leading into lobbies, halls, and passageways used in common by tenants, the passage was from one common area to another." *Id.* at 187. In the case before them, that was not the situation; rather, the door led to the demised premises and, because there was nothing contrary in the lease, the tenant retained control over the door. *Id*.

In *Underhill v. Shactman*, 337 Mass. 730, 151 N.E. 2d 287 (1958), the Supreme Judicial Court reviewed directed verdicts granted to a tenant and landlord for liability from a fall that took place in the common areas of a shopping center. Similar to the leases in this case, the lease in the *Underhill* case provided that the tenants had the right in common with other tenants of the shopping center to the parking and passageway areas. In finding that there was no error by the judge in granting a directed verdict to the tenant, the Court noted that even though the common areas were maintained for the benefit of the tenants, "it is clear from the terms of the letting that the control of these areas at all times here material was in the [landlord] tustees." *Id*. at 733. In addition to clarifying the issue of control in the common areas, the *Underhill* decision is helpful in clarifying the landlord's role in a shopping center. The *Underhill* court did not sustain the directed verdict against the landlord to the shopping center. In reaching this conclusion, the Court looked at its previous decisions and found that a rule it traditionally applies in the common area context was not appropriate in the shopping center context because of the nature of the shopping center. The rule the Court reviewed held that the duty of a landlord that leases "to several tenants, retaining control of common approaches, is to use reasonable care to maintain these approaches in as good condition as they were in or appeared to be at the time of the letting to the tenant." In finding that this rule did not apply in the shopping center context, the Court noted that a shopping center landlord does more than merely retain control of common areas, but also extends an invitation to the public for its own purpose. *Id*. at 733-734. The Court felt that a jury could "reasonably find from the nature of the business and the manner in which it was conducted that the trustees had for their own purposes extended an invitation to the public to visit the center." *Id*. at 734.

c. The leases only give Respondent a right of use in the common areas and not one of possession or lawful control.

In the leases, the landlord and the tenant identify the property over which the landlord gives Respondent the exclusive right of use. That property is called the demised premises and always includes the inside of Respondent's store. For example, in the Marshfield lease, the premises is defined as "extending to the center line of the interior partition walls and to the exterior faces of any exterior walls…." Jt. Exh. 1c, p.2. Respondent controls this property and there is no question, as Attorney Hoffman explained, that it is Respondent's right to decide who is allowed to enter the inside of the store.

As mentioned above, the areas outside the stores are generally called common areas. It is the nature of the right Respondent got from the landlord in these areas that is the core issue here, since it is undisputed that the union solicitors were engaged in handbilling in the common areas of Respondent's stores, and Respondent has admitted it expelled union solicitors from those areas. Jt. Exhs. 1 and 3.

The common area provisions of the leases involved here give Respondent a non-exclusive right to use these areas. As mentioned, generally included in the common areas are the areas outside the store in the shopping center that all the tenants share.[118] For example, in the Yarmouth lease, Section 7.1 provides that the landlord agrees the tenant, together with all others lawfully entitled thereto, have the non-exclusive right to use the parking facilities and other common areas and facilities contained within the Shopping Center … for the purposes designated by Landlord and for the accommodation and parking of such automobiles of Tenant, its officers, agents, employees and customers while shopping in the Shopping Center; but it is understood and agreed that Landlord shall have the right to designate from time to time, the portions of the Shopping Center that shall be used as parking areas, approaches, exists, entrances, roadways and the like….

The parties also agreed to other limitations on Respondent's use of the common areas, including that it is subject to "such reasonable rules and regulations as Landlord may from time to time establish."

As is evident from this language and from the other leases, the right the tenant is receiving from the landlord to use the common areas is a limited non-exclusive right. As both experts agreed, the right is not one of possession or control, it is a right of use.[119] It is the landlord who retains possession and control of the common areas and, as Attorney Hoffman explained, there is a very logical reason for this arrangement -- someone has to have the final word on what goes on in the common areas. It is illogical to imagine that each tenant can decide on its own to take matters into its own hands with respect to these areas.[120] Similar to the tenant in *Underhill*, Respondent did not have control of the common areas.[121] As mentioned above, the trespass statute and Massachusetts common law both require possession and/or lawful control of premises as a prerequisite to pursuing an action to keep a third party off the premises in question. Since Respondent did not have either of those rights in the common areas, Respondent had no legal basis to exclude the Union solicitors.

d. The limitation on third parties that are invited to use the common areas is not relevant to this case.

Respondent will argue that the Union solicitors were trespassers, since they are not

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[118] Although in some of the leases there is not a specific common area provision, there is always a demised premises provision and anything not included in that provision is considered a common area. See, for example, the Melrose lease.

[119] Attorney Hovey never took the position that Respondent had control over the common areas, even though he was, at times, reluctant to concede that the landlord retained control, something he would concede and then back away from. Attorney Hoffman testified without any doubt that the landlord retained control of the common areas.

[120] Respondent's conduct concerning the common areas during the course of the UFCW's campaign indicates that Respondent itself knew that it did not have control of the common areas at many of its stores. This is evident from the repeated letters it sent to its landlords soliciting the right to enforce the landlords' rights in the common areas, by Attorney Moon's letter to the Norwood landlord in which he states "Shaw's does not control the space outside the store premises and therefore has not been able to ask the union organizers to leave," and by the memorandum Cindy Garnett sent to store managers where the property was owned by Respondent, or where Respondent had responsibility for common area maintenance. Apparently Respondent was under the mistaken belief that if it was in charge of maintenance, it could argue that it controlled the common area. While this is not correct, it does indicate that Respondent understood that who is in control of the common areas is a key issue in deciding whether Respondent can exclude third parties from those areas. Regarding its soliciting landlords for the right to exclude union solicitors, this is illegal and will be discussed below, but as Attorney Hoffman testified, parties do not solicit other parties for rights they already have.

[121] The right to use the common areas is not a new concept, as Attorney Hovey seemed to suggest.

included in the groups identified in the leases as invited to use the common areas. This argument misses the key point, which is that it is up to the landlord to decide whether third parties are permitted onto the property or not. Different tenants may have different views on who is permitted in the common areas, but it is the landlord who retains the right to make the final determination. For example, Attorney Hovey believes "mall walkers" who come to the mall to socialize and exercise are trespassers, while Attorney Hoffman does not. Attorney Hovey reads the term "business invitee" narrowly, claiming anyone coming on the shopping center property must intend to buy something. Attorney Hoffman, on the other hand, views the term more liberally, and it makes sense, as the *Underhill* court reasoned, that the shopping center owner wants to invite the public to the shopping center, since the heavier the potential customer traffic, the more shopping there will be. For this reason, Attorney Hoffman does not view mall walkers as trespassers. This is an honest dispute, but not a relevant one, since the parties to the lease understood that the landlord will decide whether someone is a trespasser or not, and be responsible to notify them, pursuant to the statute, that they are not welcome onto the property.[122]

Having failed to cite any Massachusetts cases or the Massachusetts trespass statute in his testimony, or even to have mentioned that such a statute exists, Attorney Hovey cites a Pennsylvania case, *Logan Valley Plaza, Inc. v. Amalgamated Food Employees Union Local 509, AFL-CIO,* 425 Pa. 382, 425 A. 2d 874 (1967), revd. 391 U.S. 308 (1968),[123] to make his point that the invitation to use the shopping center does not include Union solicitors and that they should be considered trespassers. The main problem with this argument is that Respondent operates in Massachusetts where there is case-law and a statute supporting the conclusion that it is the landlord who holds the right to expel third parties. In this regard, Attorney Hovey admitted the obvious, that he does not look at other jurisdictions to find case-law unless he cannot find a Massachusetts case.

The second problem with relying on this Pennsylvania case is that the *Logan Valley Plaza* court specifically noted that the tenant in that case had posted a sign on its property which stated, "No trespassing or soliciting is allowed on Weis Market porch or parking lot by anyone except Weis employees without the consent of the management." *Id*. at 388. There is no record evidence here about whether Respondent posted such signs in the common areas or not.[124] The third problem with relying on the *Logan Valley Plaza* case is that there is no analysis in the case about control, or whether Pennsylvania has a trespass statute similar to the Massachusetts statute.

While we can look at other jurisdictions and perhaps find different answers, that still will not answer the only question that is relevant in this case, which is what Massachusetts law says concerning Respondent's right to exclude the Union solicitors from the common areas outside its stores. In New York, for example, another jurisdiction Attorney Hovey testified he looks at when he cannot find a Massachusetts case on point, in *Best Yet Market*, 339 NLRB No. 104, the Board affirmed the administrative law judge's analysis of common areas under New York law. The judge there concluded that the respondent in that case had "joint use" of the parking

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[122] The fact that Respondent may have a right to bring a cause of action for breach of quiet enjoyment or be able to engage in self-help if it believes the landlord is allowing third parties in the common areas that should not be there, has no relevance to the nature of the property right Respondent has in the common areas.

[123] The United States Supreme Court decision in *Logan Valley Plaza* was subsequently overruled in *Hudgens v. NLRB*, 424 U.S. 507 (1976)

[124] This fact was seen as a key fact by the Fourth Circuit Court of Appeals in a later case involving Weis Markets. See *Weis Markets, Inc v. NLRB*, 265 F.3d 239, 246 (4th Cir. 2001).

lot, but not exclusive control or the ability to possess it to the exclusion of the other tenants. *Id*. slip op. at 4. As such, the judge found that under New York law, the respondent "did not have the right to exclude persons from picketing or demonstrating in the parking lot." *Id*. Given that Massachusetts law requires possession or control of the common areas to exclude an individual, this analysis is similar to a Massachusetts law analysis. Fortunately, however, we need not rely on New York law, or any other jurisdictions we might research and write about, since Massachusetts law is clear on this subject.

e. Respondent's letters to its landlords did not give Respondent a right to exclude Union solicitors from its property.

Respondent may argue that the permission it received from some of its landlords, in response to its letters requesting the right to maintain the common areas, provided it with a sufficient property interest to exclude union solicitors from the property. As will be discussed below, it is clear under Board law that these letters cannot be used to support Respondent's property right claim, since they themselves violated Section 8(a)(1) of the Act, as Respondent cannot, through these letters, prohibit otherwise lawful union solicitation. There is, as well, an additional reason why these letters cannot be used to support Respondent's claim that it had a right to exclude union solicitors, and that is because a Massachusetts court would not uphold Respondent's reliance on these letters in a situation such as this one.

Attorney Hoffman explained that while these letters appear to give Respondent the authority from the landlords to initiate a trespass action against union solicitors, that authority would be unenforceable in Massachusetts, if federal law holds that union solicitors can solicit peacefully in the common areas of Respondent's stores. In fact, Respondent agreed that this letter would not give Respondent the right to bar union solicitors, if they are otherwise allowed to be on the property. In this case, Respondent did not have a sufficient property interest in the common areas, so the Union solicitors had a legal right to be in the common areas, even if Respondent was enforcing a lawful rule in a non-discriminatory way. Therefore, Respondent could not rely on these letters to assert it had a sufficient property right. In addition, the Union solicitors were lawfully in the common areas because Respondent's rule was a discriminatory rule, applied in a discriminatory fashion, so a Massachusetts court would not allow Respondent to rely on these letters to expel union solicitors for that reason, as well.[125]

A. Respondent violated Section 8(a)(1) of the Act by Soliciting the Landlords or Entity in Control of the Common Areas at Respondent's Falmouth, Harwich, New Orleans, Marshfield, Yarmouth, Ipswich, Franklin, Hyannis, and Gloucester Locations, to allow Respondent to Enforce Solicitation Rules in Order to Interfere with and Prohibit Union Solicitation at these Stores, Where it did not have a Sufficient Property Right on its own to Exclude Union Solicitation

[125] Respondent may try to argue that *Commonwealth v. Nofke*, 376 Mass. 127, 379 N.E. 2d 1086 (1978) stands for the proposition that a private employer may prohibit union solicitation on its property. This is not what *Nofke* holds. Rather, the *Nofke* decision is a preemption case in which the court found that where a labor organization did not file a charge at the National Labor Relations Board against the employer that prohibited it from soliciting, and because the employer could not file a charge, preemption was not an issue and the court would entertain a trespass action. In the present case, the Unions obviously filed charges at the Board and that is why we are here. Also note that the *Nofke* holding was narrowed by *Batchelder v. Allied Stores International* , 388 Mass. 83, 88 fn 8, 445 N.E. 2d 590 (1983), where the court noted that the *Nofke* case dealt with the parking lot of a private hospital and "[t]he difference between a parking lot of a private hospital and the common area of a multiestablishment shopping center is significant."

As discussed above, Respondent at several of its stores, did not have a sufficient property interest in the common areas of its store locations to expel Union solicitors from the outside of its store locations. Respondent, however, did not let this fact stop it from ridding itself of Union solicitation; it simply expelled Union solicitors anyway. As mentioned above, that is a violation of the Act. Respondent violated the Act for an additional reason, as well. At some locations, where it did not have a sufficient property interest to exclude Union organizers, it solicited this property right from the landlord to do so and then proceeded to exclude Union solicitation.[126] This action was specifically targeted at union activity, as is indicated by the letters themselves. Furthermore, Vice President of Labor Relations Nadworny admitted that Respondent has never written letters such as these letters to its landlords, seeking the right to exclude Union solicitors, for any other kind of solicitation taking place at its stores.

In *Wild Oats,* 336 NLRB 179, the Board found that the employer violated Section 8(a)(1) of the Act by initiating a chain of events that culminated in the attempted removal of nonemployee union representatives engaged in lawful protected activity. As is the case with Respondent, the employer in *Wild Oats* did not have a sufficient property right to exclude union solicitors from the front of its store. Thus, it could not have excluded them on its own. When confronted with the union solicitors, the employer contacted the manager of the strip mall shopping center to report the presence of the picketers and to inquire about the owner's policy regarding such picketing activity in the owner's parking lot. *Id*. at 179. After the *Wild Oats* employer made that call, an agent of the manager, accompanied by the employer's attorney, approached the union representatives and asked them to move. *Id*. When the union organizers would not move, the manager's agent called the police to have them removed. The police refused to move the organizers based on the county prosecutor's directions on how to deal with trespassing complaints during a labor dispute. *Id*.

In addressing the 8(a)(1) violation, the employer in *Wild Oats* argued that because it did not actually place the call to the police to have the picketers/handbillers removed, it could not be found to have violated the Act. *Id*. at 181. The Board rejected that argument, stating that the employer's actions constituted an indirect attempt to expel the union representatives and, consequently, constituted interference with employees' Section 7 rights. *Id*. As the Board explained,

> It is beyond cavil that had the Respondent directly ordered the union representatives to cease picketing and vacate the premises or, alternatively, directly requested the police to remove the union representatives, the Respondent would have engaged in unlawful interference with employee Section 7 rights [citations omitted]. It would be anomalous, therefore, to permit the Respondent to accomplish the same objective by indirect means – to engage in conduct that has the intended and foreseeable consequence of interfering with employee Section 7 rights.

In the case at hand, Respondent did not have the right to exclude the Union solicitors, since it only had a right of use in the common areas, as discussed above. Knowing this, Respondent wrote letters to the landlords, seeking the right to maintain the landlord's property in the event of union activity. In the March 5, 2002 letters, Respondent could not have been

[126] For this section, the store locations discussed will include those listed in the heading above, unless otherwise noted. While arguably Respondent violated Section 8(a)(1) of the Act at every location where it solicited property rights from the landlord where it did not otherwise have a property right, General Counsel has only alleged locations where Respondent solicited the property right from the landlord, actually received the property right, and then excluded Union solicitors.

clearer regarding what activity it sought to prevent, when it stated that the union activity consisted "mainly of two or three individuals coming onto your Shaw's/Star private property and attempting to solicit and hand out literature to Shaw's/Star employees." Respondent asked for and received from the landlords, the right to enforce solicitation and distribution rules to remove Union agents from the common areas outside these stores. Jt. Exh. 1, paragraph 4.

Respondent admits that at these locations, it did, in fact, prohibit Union solicitation. Jt. Exh. 1. At the Harwich, Orleans, Marshfield, and Hyannis stores, Respondent admits that it actually showed copies of the landlord authorization letters to the police when it sought their help in removing Union solicitors. Jt. Exh. 1, paragraph 5. Additionally, based on Patrick Connors' testimony, it is clear that at the South Yarmouth store, Respondent showed the police a letter it had received from the property manager, in which the manager asked the police for its assistance based on the tenant's information to the manager of possible Union picketing. Though there was no picketing, it is clear that the police relied on this letter in removing Connors and Farley from the South Yarmouth store.

At the Falmouth store, Respondent also wrote letters to its landlord seeking the right to exclude Union solicitors from outside the Falmouth store. Based on Michael Connors' testimony, it is clear that on September 7, 2001, when he and McClay visited Respondent's store location, Respondent relied on a letter it had from the landlord to prohibit them from soliciting in the common areas at this location. It is also clear from Michael Connors' testimony that John Dougherty, the property manager from the landlord, was involved in keeping Union solicitors off the common areas at the behest of Respondent. This is clear from the letters Respondent sent to the landlord; from the fact that it was only after Respondent's managers called the police and confronted the solicitors that Dougherty came out to talk to the police and handed the solicitors no trespass notices; from the tone of Respondent's letter to the Falmouth police once the police took the position they would no longer be involved in the labor dispute; from the fact that Attorney Moon represents Flatley and Respondent for purposes of this case; and from the fact that Flatley and Respondent both sent almost identical no trespass notices to the UFCW on the same day.

Respondent's actions in enlisting its landlords to exclude the Union solicitors, who were engaged in lawful handbilling, is clearly a violation of Section 8(a)(1) of the Act based on the reasoning in *Wild Oats*. Respondent did not have the right to exclude the Union solicitors and committed Section 8(a)(1) violations when it excluded them. It could not then get around its Section 8(a)(1) conduct by enlisting the landlords' help to do indirectly what it could not do directly, especially in this case, where there is no doubt that there was no other possible reason for Respondent's seeking the right to exclude others from the property than to stop the otherwise lawful union activity.

B. Respondent violated Section 8(a)(1) of the Act by Prohibiting its Off Duty Employees From Engaging in Union Solicitation and Distribution in the Outside Nonworking Areas of Stores Other Than Those at Which They Work

As previously stated, in support of the UFCW's organizing efforts, employees who work in stores represented by Local 791 visited Respondent's unorganized stores in an effort to solicit the employees working in those unorganized stores to become unionized. A total of seven employees participated in visiting a total of nine different stores over two days in December 2001 and one day in February 2002. At eight of the nine stores,[127] each of the seven

[127] The General Counsel is not alleging that Respondent violated the Act with respect to the events that

Continued

employees who participated in this organizing effort were met with the same treatment – Respondent asked them to leave and, on some occasions, it enlisted the help of local law enforcement officials to get them to leave. There is no disputing the fact that Respondent is relying on the solicitation/distribution policy it maintains for *nonemployee* solicitation/distribution in prohibiting these off site employees access to its stores. As Vice President of Labor Relations Nadworny repeatedly stated, it is Respondent's view that these employees are simply members of the public when they visit a store in which they are assigned.[128] This assertion is simply not true, however, that an offsite employee may be treated the same as nonemployee union representatives, or other members of the public, when they visit one of their employer's stores for purposes of union solicitation and distribution. The Board, with court approval, has specifically found that offsite employees have a nonderivative access right, for organizational purposes, to their employer's facilities. *ITT Industries, Inc.*, 341 NLRB No. 118, slip op. at 2-3 (2004) citing *Hillhaven Highland House*, 336 NLRB 646 (2001), enfd. 334 F.3d 523 (6th Cir. 2003). In this regard, the Board has reasoned that while an employer may have heightened property-right concerns when offsite employees seek access to their property, on balance, the Section 7 organizational rights of offsite employees entitle them to access to outside nonworking areas of the employer's property, except where justified by business reasons which may involve considerations not applicable to access by onsite off duty employees. *Id*.

1. The Section 7 Rights of Offsite Employees

Applying the analysis espoused in *ITT Industries* and *Hillhaven* to this case, there is no disputing that Respondent's employees visited store locations other than those at which they work during nonworking time, as follows: employees Johnson and Ferreira sought access to the outside walkways and parking lot of Respondent's Cedarville and Marshfield Star stores on December 10, 2001; employees Berger, Simmons, and Carreira sought access to the outside walkways and parking lot of Respondent's Orleans and Harwich Star stores on December 11, 2001; and employees Erchull and Langis sought access to the outside walkways and parking lots of Respondent's Hyde Park Star Market, West Roxbury Shaw's Supermarket, Brookline Star Market, and Mt. Auburn Street/Cambridge Star Market stores on February 6, 2002. The record also clearly establishes that as offsite employee visitors, they all sought to promote their union and the benefits it offered to those employees working onsite. Accordingly, they had a freestanding nonderivative right of access under the Act. *Hillhaven*, supra; *ITT Industries*, supra. Significantly, the Cedarville, Marshfield, Harwich, and Orleans stores are located within the counties covered by the collective-bargaining agreement Local 791 has with Respondent. As such, it is conceivable that should those onsite employees become unionized, they would become part of the existing collective-bargaining unit with the offsite employees who are soliciting them. The Section 7 rights of the offsite employees at those stores are at their greatest. As the *Hillhaven* Board observed, "[t]he offsite employee's personal stake in organizing his counterparts at a different employer facility is clearest where he is, or will be part of a multifacility bargaining unit that includes onsite employees." 336 NLRB at 649.

2. Respondent's Private Property Concerns

Respondent asserts several business justifications for denying offsite employees access to engage in organizational activities. First, Respondent appears to claim that the outside areas

occurred at the Morrissey Boulevard store on February 6, 2001, involving employees Erchull and Langis.

[128] Of course, even if Nadworny were correct that offsite employees are simply members of the public, which they are not, Respondent violated Section 8(a)(1) of the Act for all the same reasons, discussed above, that Respondent violated Section 8(a)(1) in denying access to the nonemployee UFCW and IBEW representatives.

of the stores that offsite employees visited – walkways and parking lots – are working areas. In this regard, Respondent offered evidence that it displays seasonal merchandise on the walkways outside its stores and that there are employees who work in the parking areas collecting carriages and loading groceries for customers. The Board was faced with a similar issue in *Santa Fe Hotel & Casino*, 331 NLRB 723 (2000). In that case, an employer excluded employees from engaging in solicitation activity outside the entrances to its hotel and casino on the ground they were working areas because that was where its bellmen, parking attendants, gardeners, cleaning and maintenance employees, and security officers worked. The Board determined that 'the occurrence of nonproduction work activity on part of an employer's property does not, by itself, allow an employer to declare its entire property to be a "working area" for the purpose of excluding employee solicitation activity.' *Id.* at 723, citing *U.S. Steel Corp*., 223 NLRB 1246, 1247-48 (1976). The Board reasoned that this work activity was incidental to the main function of the employer's business – to lodge people and permit them to gamble – and to hold that the area was thus a work area where solicitation could not occur would '"effectively destroy the right of employees to distribute literature."' *Id.*, quoting *U.S. Steel*, 223 NLRB at 1248. The same could be said here. Like the work of the bellmen, parking attendants, and gardeners at issue in *Santa Fe Hotel*, the work that goes on outside Respondent's stores, including carriage collecting, grocery loading, and seasonal displays, is incidental to the main function of Respondent's business – selling groceries – which occurs inside the store. That Respondent does not recognize the outside areas of its stores to be working areas is evidenced by the fact that Respondent admits that employees are allowed to take their breaks outside the store wherever they want. As such, even if the work that occurs in the walkways and parking lots outside the stores was not considered incidental to the main function of Respondent's business, those areas, at the very least, are mixed use areas where Respondent cannot lawfully prohibit solicitation/distribution. *United Parcel Service*, 327 NLRB 317 (1998), affd. 228 F.3d 772 (6th Cir. 2000); *Transcom Lines*, 235 NLRB 1163 (1978), affd. in relevant part 599 F.2d 719 (5th Cir. 1979).

Respondent also seems to argue that given the number of stores it operates and the number of people it employs, it would be difficult for it to be able to verify if the offsite employee solicitors are current employees of Respondent. The record clearly establishes, however, that all seven offsite employees identified themselves to the onsite employees and managers and supervisors as being employed by Respondent at a unionized store. While it may be true that some employees of Respondent have the same name, as Rosemary Slamon testified, there is no credible evidence that Respondent was unable to verify their status or that it even attempted to verify their status in denying them access. In fact, the evidence shows that Respondent had no difficulty identifying the solicitors as employees. [129] As offsite employee Don Berger testified, the day after he went to the Harwich and Orleans stores, he was approached at work by then district manager Hank Wolfson, who, unsolicited, commented about Berger's visits the day before to Star Markets on Cape Cod. Under these circumstances, Respondent's argument should be rejected. *Hillhaven*, 336 NLRB at 650.

Respondent also argues that it was justified in denying access to the offsite employees because they were, in actuality, nothing more than agents of the UFCW. While it is true that the UFCW may have selected the stores for the offsite employees to visit, provided them with transportation to those stores, and given them instructions on what to do, including such instructions as not to leave until a law enforcement official told them to, none of that would

[129] For the reason's stated above in the facts, Assistant Grocery Manager Evan Dobratz' testimony concerning the events of December 10, 2001, when he tried to claim that offsite employee Bill Johnson was inside the store when he was asked to leave and refused to identify himself, should be discredited.

disqualify them from obtaining access to their employer's stores.[130] Indeed, in *Hillhaven*, supra, the offsite employees were soliciting with nonemployee union organizers and the Board nevertheless found that the employer violated the act in denying access to the offsite employees. In the instant case, the nonemployee UFCW representatives did not even participate in the solicitation/distribution activities of the offsite employees. The record also shows that the offsite employees volunteered to participate in the campaign. None were paid by the UFCW for their time. Although some of those involved were stewards at their own stores, for which they receive a stipend from the Union, they are still employees entitled to the protections of Section 7. *NLRB v. Town & Country Electric*, 516 U.S. 85 (1995). Accordingly, the foregoing arguments should be rejected.

Any argument that the offsite employees were properly denied access because they spoke to employees while the employees were working or otherwise interfered with Respondent's operations should also be rejected. In this regard, the record demonstrates that at most locations, the offsite employees spoke to onsite employees who were outside the store either on break or coming into or leaving work. Indeed, based on the testimony of five of the offsite employees who participated in the campaign, it is evident that when the offsite employees went to a store, they tried to determine where the onsite employees took outside breaks, and generally focused their solicitation/distribution efforts in those areas. There is no evidence that any of the offsite employees interfered with customer access to the stores, or with any of Respondent's outside seasonal displays. Although there were three stores where the offsite employees spoke to onsite employees while they were performing work outside the stores - Harwich, Hyde Park, and Brookline - the offsite employees who engaged in those solicitations were not denied access because they had spoken to employees while they were performing work. In asking the offsite employees to leave the store, the store managers at those locations made no mention of the fact that the offsite employees were speaking to onsite employees while they were working. Moreover, as Nadworny admitted in his testimony, the offsite employees would have been denied access regardless of whether they were speaking to employees who were working or not, explaining that they were denied access because union organizing did not fall under what is permitted solicitation/distribution by nonemployees under Respondent's policy.

Finally, any argument that Respondent properly denied access to employees Berger and Ferriera based on their employee status should also be rejected. Initially, whatever question Respondent has concerning the employee status of Berger and Ferriera does not justify its actions in denying access to the other five offsite employees whose status Respondent does not dispute. With respect to Berger, Respondent argues that as a department manager, Berger is a Section 2(11) supervisor who is not afforded the protections of the Act. Yet at the time he engaged in the solicitation/distribution at the Orleans and Harwich stores, not only was Berger a unit employee and a steward at the store in which he worked, there is no evidence that Respondent, even knowing of his involvement in union activity at the time, made any mention of

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[130] At the hearing, Respondent appeared to argue that by refusing to leave the outside areas of Respondent's stores when asked to do so by a store manager or supervisor, pursuant to instructions given to them by UFCW representatives, the offsite employees were acting as agents of the UFCW. This does nothing to establish an agency relationship between the UFCW and the offsite employees. It is true that the Board has recognized that offsite employees could be subject to discipline if they engage in misconduct or vandalism. *ITT Industries, Inc.*, 341 NLRB No. 118, slip op. at 4 (2004), citing *Hillhaven*, supra. The offsite employees here were not engaged in any misconduct at the behest of the UFCW. Rather, they were simply seeking to exercise a right guaranteed them under the Act in resisting Respondent's request that they leave voluntarily. That Respondent did not view this action as a disciplinary matter is evidenced by the fact that no employees were disciplined and by Nadworny's testimony that an offsite employee's refusal to leave the outside areas of a store at the request of the store manager or supervisor would not be considered to have been disobeying an order from a superior.

the fact that it considered him a statutory supervisor who did not enjoy the protections of Section 7 of the Act.[131] With respect to Ferriera, it is Respondent's position that because he was terminated at the time he visited the Cedarville and Marshfield stores with Johnson, he was not an employee. The evidence shows, however, that at the time he participated in the solicitation with Johnson, his discharge was pending arbitration. Thus, his employment status with Respondent was unresolved. Section 2(3) specifically defines a statutory employee to include "any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute . . . ." The Board has also held that a discharged employee remains a statutory employee entitled to the full protection of the Act. *Waco, Inc.,* 273 NLRB 746, 747 fn. 8 (1984) citing *Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977). Under these circumstances, Ferreira was a statutory employee when he engaged in the offsite solicitation with Johnson. Compare *Kellwood Co.*, 299 NLRB 1026, 1029 (1990), enfd. 948 F.2d 1297 (11th Cir. 1991)(discharged employees are entitled to be considered employees of the employer for the purpose of serving as election observers pending resolution of charges against employer).[132]

Based on the foregoing, it is submitted that Respondent violated Section 8(a)(1) of the Act when, on December 10, 2001, Michael Zajko and Evan Dobratz, at the Cedarville store, and Brian Schwade, at the Marshfield store, prohibited offsite employees Johnson and Ferreira from engaging in union solicitations/distributions outside those stores. In this regard, Respondent violated Section 8(a)(1) when, as Johnson testified, Zajko at the Cedarville store, told Johnson and Ferreira that they were not allowed to be there, that they should not be there, that Respondent did not want Union representatives on the property, and that he would call the police if they did not leave. Respondent further violated the Act when Dobratz called the police to have Johnson and Ferreira ejected. Similarly, Respondent violated Section 8(a)(1) when, as Johnson testified, Schwade, at the Marshfield store, told Johnson and Ferreira that they were not wanted there, and that he would call the police if they did not leave. Respondent further violated Section 8(a)(1) when Schwade called the police to have Johnson and Ferreira ejected. Respondent also violated Section 8(a)(1) of the Act when, on December 11, 2001, Laurie Sances, at the Orleans store, and Jessie Fleck, at the Harwich store, prohibited offsite employees Berger, Simmons, and Carreira from engaging in union solicitation/distribution outside those store locations. Respondent violated Section 8(a)(1) of the Act when, as Simmons testified, Sances, at the Orleans store, told them that they were trespassing and that if they did not leave she would call the police. A further Section 8(a)(1) violation occurred when Sances called the police to have the offsite employees ejected. Similarly, Respondent violated Section 8(a)(1) of the Act when, as Simmons and Berger testified, Fleck told Berger, Simmons, and Carreira that they were trespassing and would have to leave, and that if they did not leave he would call the police. Fleck then calling the police was a further Section 8(a)(1) violation. Finally, Respondent violated Section 8(a)(1) of the Act when, on February 6, 2002, Frank Gillis and Mike Hanrahan, at the West Roxbury store, Dan Barry, at the Brookline store, and Mike Risitano, at the Mt. Auburn Street store, prohibited offsite employees Erchull and Langis from engaging in union solicitation and distribution outside those stores by calling the police to have them ejected. Respondent further violated Section 8(a)(1) of the Act, based on the testimony of

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[131] Any assertion that Respondent properly prohibited offsite employees from engaging in union solicitation and distribution outside its stores because some of the individuals who were solicited may have been department managers, whom Respondent considers to be statutory supervisors, is without merit. Department managers are included in the existing multilocation bargaining unit, so that any attempts to solicit them for the Union are justified.

[132] Even assuming, without conceding, that the pending arbitration did not allow Ferreira access as an offsite employee, he nevertheless is entitled to access as a nonemployee engaging in union organizing because of Respondent's discriminatory policy.

Langis and Erchull, when, on February 6, 2002, Anthony Rapoza, at the Hyde Park store, told them that they could not be there, that they had to leave, and if they did not, the police would be called.

C. The Rules Respondent Applied to Employee Solicitation and Distribution are Overly Broad and Violate Section 8(a)(1) of the Act

During the course of the trial in this matter, Respondent amended the solicitation/distribution policy it applies to its employees. The original rule was set forth in the March 2003 employee handbook. That rule on its face appeared to be lawful, inasmuch as it only prohibited employees from engaging in solicitation during their work time or the work time of the associates being solicited. With respect to distribution, it only prohibited employees from distributing literature or other materials in work areas during their work time or the work time of those to whom distribution is being made. On its face, the rule also appeared to lawfully define work time as not including lunch breaks, break periods, or other authorized time during the work day when associates are not required to be working. Although the rule appears lawful on its face, Nadworny testified that Respondent would apply the rule to prohibit off-duty employees from engaging in union solicitation in the parking lot of the store in which they are assigned to work. The Board has specifically held, however, that an employer violates Section 8(a)(1) of the Act by restricting its off-duty employees' access to outside areas of their work place. *Tri-County Medical Center, Inc.*, 222 NLRB 1089 (1976). Accordingly, Nadworny's interpretation of the rule, that it prohibits off-duty employees from engaging in union solicitation and distribution in the outside areas of their own stores, violates Section 8(a)(1) of the Act.

Following Nadworny's testimony, Respondent amended the solicitation/distribution rule that appears in the handbook. Simply put, based on the language of the new rule, it is evident that Respondent is trying to destroy the right guaranteed to employees under Section 7 of the Act to engage in union solicitation and distribution outside its stores. Thus, the amended rule changes where employees are allowed to solicit. Where the old rule was silent, under the new rule, employees are not allowed to solicit in areas of the store used by customers to shop (referred to as shopping areas) and those areas of the store where store personnel service customer needs (referred to as selling areas). Under the new rule, selling and shopping areas outside the store include areas where product is displayed.

It is unclear from the amended rule where Respondent will allow employees to engage in solicitation outside its stores. Pursuant to a reasonable reading of the rule, a shopping area could include the parking lot because that is a place store personnel may service a customer's needs. For example, store personnel might help customers load groceries into their vehicles. Collecting carriages might also be viewed as servicing a customer's needs. Although the new rule states that a sales and shopping area includes areas outside the store where product is displayed, if the product is displayed on the walkway, it is unclear if solicitation is prohibited on the entire walkway or just the area where the product is on display. It is also unclear from the rule whether solicitation is prohibited in those areas only when there is product actually on display, or at all times regardless of whether product is present or not. Because the rule leaves employees uncertain where outside the store they are allowed to solicit, and the rule arguably prohibits solicitation in all outside areas of the store without any business justification for doing so, Respondent's amended solicitation rule is invalid. *Aluminum Casting & Engineering, Co., Inc.*, 328 NLRB 8, 9 (1999), enfd. in relevant part 230 F.3d 286 (7th Cir. 2000); *Tri-County Medical*, supra.

With respect to distribution, the new rule still prohibits employees from distributing literature on work time and in work areas. Respondent has, however, changed the definition of work areas to include the parking lot and sidewalk outside the store. Although there is work that occurs in the parking lot, and there are times when Respondent displays items for sale on a portion of the sidewalks outside its stores, that work is incidental to the business of the store, selling groceries, which occurs inside the store. Accordingly, Respondent cannot prohibit its employees from distributing union literature in those areas and the rule is invalid as a result. *Santa-Fe Hotel*, 331 NLRB 723. Even if those areas were not incidental to Respondent's business, they are, at the very least, mixed-use areas, since employees are allowed to take a break wherever they wish outside the store. Respondent may not lawfully deny distribution in mixed-use areas, and the new rule would be unlawful for that additional reason, as well. *UPS*, 327 NLRB 317; *Transcom*, 235 NLRB 1163.

The rule as amended is also unlawful because it now specifically prohibits off- duty employees of one store from engaging in solicitation at another store, except to the extent that the solicitation is in accordance with Respondent's policy of permitting civic and charitable solicitations. In other words, off-duty employees are not allowed to engage in union solicitation or distribution in the outside areas of Respondent's stores at which they are not assigned to work. Inasmuch as such a rule violates Section 8(a)(1) of the Act pursuant to the Board's decisions in *ITT Industries*, supra, and *Hillhaven*, supra, the rule, as amended, is unlawful. In addition, the rule as amended prohibits off-duty employees from engaging in solicitation of customers or other nonemployees at any time. This, in effect, would preclude employees from distributing union literature to the public (customers and other nonemployees), a right guaranteed to employees by Section 7 of the Act. *Debartolo*, 485 U.S. 568. The rule, therefore, is overly broad and violates Section 8(a)(1) of the Act. *Strack*, 340 NLRB No. 172; *Gayfers Department Store*, 324 NLRB 1246 (1997). Moreover, because Respondent would allow off-duty employees to engage in charitable or civic solicitation of the public in the areas outside its stores, the rule discriminates against union activity and violates Section 8(a)(1) for that reason, as well.

Finally the rule is violative of the Act because it also prohibits employees from soliciting and distributing literature to coworkers who do not wish to be solicited, and further states that no associate may harass, inconvenience, or pursue another who has asked not to be solicited. It is inevitable that union organizing activity will engender debate, argument, and even discord at times. The Board has specifically recognized that "[t]he right to free discussion about union matters on nonwork time such as coffee breaks would be meaningless if subject to curtailment simply because a fellow employee registers displeasure in general terms." *W.J. Ruscoe Co.*, 166 NLRB 618, 619 (1967). Accordingly, this restriction violates Section 8(a)(1).

D. Respondent Engaged in Additional Unlawful Conduct in Furtherance of its Campaign Against the Unions

1. Respondent Interrogated Employees About Their Union Activities and Instructed Employees Not To Speak to Union Agents in Violation of Section 8(a)(1) Of The Act.

On August 8, 2001, UFCW organizer Bart Pyle saw and heard Respondent's general merchandise manager, Carol Kearney, who Respondent admits in its Answer is a statutory supervisor, interrogate employees and tell them not to talk to the Union. This was the same day that she unlawfully called the police and had Pyle and the UFCW representative he was with, Mike Grasiday, ejected from the parking lot outside the South Yarmouth store. Specifically, Pyle testified that before he was ejected, he heard Kearney, outside the South Yarmouth store, ask

the employees, after they spoke to Grasiday, "was that the union you were talking to?"[133] After the employees admitted that it was the Union, Kearney then told them "you don't need to be talking to the Union."

Kearney's asking the employees about whom they were talking with and then telling them not to speak with the Union was a violation of the Act. In determining if an interrogation violates Section 8(a)(1) of the Act, the Board looks at whether, under all the circumstances, the interrogation reasonably tends to interfere with, restrain, or coerce employees in the exercise of their Section 7 rights. *Emery Worldwide*, 309 NLRB 185, 186 (1992), citing *Rossmore House*, 269 NLRB 1179 (1984) and *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1218 (1985). In *Medcare Associates*, 330 NLRB 935, 939 (2000), the Board declared the continuing vitality of the "totality of circumstances" test adopted in *Rossmore House* and stated that,

> [I]n analyzing alleged interrogations under the *Rossmore House* test, it is appropriate to consider what have come to be known as "the *Bourne* factors," so named because they were first set out in *Bourne v. NLRB*, 332 F.2d 47, 48 (2d Cir. 1964). Those factors are: (1) The background, i.e., is there a history of employer hostility and discrimination? (2) The nature of the information sought, e.g. did the interrogator appear to be seeking information on which to base taking action against individual employees? (3) The identity of the questioner, i.e., how high was he in the company hierarchy? (4) Place and method of interrogation, e.g. was employee called from work to the boss's office? Was there an atmosphere of unnatural formality? (5) Truthfulness of the reply.

The Board explained that the "flexibility and deliberately broad focus of this test make clear that the *Bourne* criteria are not prerequisites to a finding of coercive questioning, but rather useful indicia that serve as a starting point for assessing the 'totality of the circumstances.'" *Id*. at 939, citing *Perdue Farms, Inc. v. NLRB*, 144 F.3d 830, 835 (D.C. Cir. 1998), quoting *Timsco, Inc. v. NLRB*, 819 F.2d 1173, 1178 (D.C. Cir. 1987).

In *Sanderson Farms, Inc.*, 340 NLRB No. 59, slip op. p. 7 (2003), the administrative law judge discussed the above test and its flexibility, where an employer representative asked an employee who was returning to work if he knew that a union had come in, and the employer representative also asked the employee his position on the union. After these questions, the employer representative told the employee to "stay away from Bill Noland if he did not want to get involved in the Union." The administrative law judge, affirmed by the Board, found that the interrogation was unlawful and that the statement "stay away from Noland" added to the showing of coercive interrogation and included an implied threat of negative consequences. *Id*.

In this case, immediately after the UFCW representatives spoke to them, the employees' immediate supervisor for the day was in the parking lot, in their break area, questioning them about it. None of these employees were open union supporters and the questioning was clearly coercive, since, similar to the situation in *Sanderson Farms*, in the next breath Kearney told these employees not to speak with the Union, another unlawful statement.[134] The interrogation and implied threat were followed by Kearney illegally ejecting the Union organizers when she called the police to have Pyle and Grasiday removed from the parking lot.

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[133] Pyle knew these individuals were employees based on their clothing and based on information provided to him by Grasiday, who had just spoken to them.

[134] This statement at the very least was harassment and/or interference with employees' Section 7 rights in violation of Section 8(a)(1).

It is submitted that Pyle's testimony should be credited over Kearney's. Pyle was straightforward, clear, and direct in his testimony. He had a clear memory of what occurred on the day in question and never wavered in that testimony. For example, Pyle testified that he was never inside Respondent's stores, even when Respondent showed him a document purporting to show that he was involved in blitzing the stores. A close look at the document, however, shows that the document, which came into evidence without any explanation, did not advance Respondent's claim that Pyle was inside the stores, since Pyle's name is listed next to the Waltham store and not South Yarmouth, where Pyle was in fact assigned to talk to employees outside the stores, and where Kearney interrogated and impliedly threatened employees.

Kearney, on the other hand, testified in a nervous fashion. She had a vague memory concerning these events and gave inconsistent testimony on other events. For example, while on direct examination she testified that these events occurred on August 8, 2001, she later admitted that she did not really know when the events she testified about occurred. She also testified that she was instructed to call the police if the Union came to the store, but could not explain why she only called the police on one occasion, and not on another occasion when she testified that the Union was at the store. Kearney also changed her testimony concerning who was a key holder, when she was informed that her testimony was not consistent with that of other managers. Kearney also gave inconsistent testimony concerning her role in instructing Union solicitors on where to stand and about what they were allowed to do.

Based on the above, Pyle's testimony should be credited and Respondent should be found to have violated Section 8(a)(1) of the Act by its conduct on August 8, 2001, at the South Yarmouth store, in calling police to have nonemployee union agents removed from outside its store; interrogating its employees about their union activities; and instructing employees not to speak to union agents.

2. Respondent Violated Section 8(a)(1) Of The Act By Taking Pictures Of Nonemployee Union Agents In The Presence Of Respondent's Employees.

At the Somerville and Brighton Mills stores, Respondent violated Section 8(a)(1) of the Act when it took pictures of UFCW nonemployee union organizers in the presence of employees. The Board has set out clear standards to apply when an employer photographs union activity. In *National Steel and Shipbuilding Company*, 324 NLRB 499 (1997), enfd. 156 F.3d 1268 (DC Cir. 1998), the Board, reviewing an earlier Board case precedent, *Woolworth Co.*, 310 NLRB 1197 (1993), summarized its fundamental principles governing this area of law and explained that:

> [P]hotographing in the mere belief that something might happen does not justify the employer's conduct when balanced against the tendency of that conduct to interfere with employees' right to engage in concerted activity. [citations omitted]. Rather, the Board requires an employer engaging in such photographing or videotaping to demonstrate that it had a reasonable basis to have anticipated misconduct by the employees. "[T]he Board may properly require a company to provide a solid justification for its resort to anticipatory photographing." [citation omitted]. The inquiry is whether the photographing or videotaping has a reasonable tendency to interfere with protected activity under the circumstances of each case. [citation omitted].

In *Barnes Hospital*, 217 NLRB 725 (1975), the Board affirmed the ALJ's finding that the employer engaged in unlawful photographic surveillance of union agents engaged in distribution and solicitation among its employees, noting that the respondent had failed to conclusively show that the conduct subjected to surveillance occurred on respondent's private property. In reaching his conclusion concerning the surveillance, the ALJ noted that "There is no way of separating the activities of an outside, paid union organizer, in solicitation activities, from the simultaneous cooperation of the employees themselves." *Id*. at 727. See also *Farah Manufacturing Company, Inc.*, 204 NLRB 173, 176 (1973), where the ALJ, affirmed by the Board, found an 8(a)(1) violation where the employer took photographs with the purpose of identifying who was distributing leaflets and to establish union responsibility in the event of illegal conduct. The pictures, however, were of picketing and handbilling, and included employees approaching the handbillers and, in some instances, employees as well as nonemployees in the vicinity.

In this case, it is undisputed that Respondent took pictures of Union solicitors in the presence of employees that they were soliciting. On at least one occasion, at the Somerville location, it is possible that if the actual photograph had been produced, we would see the employee right behind the Union solicitor in the picture, since Union organizer Hardt testified that the employee was right near her when she turned and had her picture taken. There is no doubt that the employee was in the vicinity, however, since Hardt testified she saw him right before and right after the picture was taken. Hardt had been talking to this employee and was able to identify him as such. In this context, Respondent's photographing a nonemployee union agent was unlawful, as it had an impact on the employee's Section 7 rights.[135] Similarly, Hardt testified that an employee was present during her encounter with a manager at the Brighton Mills location, and was present when the photograph was taken. Respondent will undoubtedly argue that since she was not sure whether the employee was a department manager or not, he should not be considered an employee. Given that department managers are in the bargaining unit and that there was no evidence that department managers are supervisors, this argument is without merit.

Respondent may argue that it had a right to take a picture of Hardt and other union solicitors because it was preparing or advancing a trespass action against the UFCW. Respondent did not, however, make out this claim in the record. Respondent never called the managers that took Hardt's picture to explain what the reason for the picture taking was or how it was used. In fact, Hardt testified that each time she was asked to leave by a manager, she would leave, and that she does not recall ever failing to give her name to a manager when asked.

Respondent apparently did not call the police to ask Hardt to leave, something it had no reluctance to do at other locations, and Respondent did not pursue a trespass action or present any record evidence concerning whether it had a property interest in this property sufficient to pursue a trespass action. Under these circumstances, Respondent's conduct cannot be excused based on a theory that it was gathering evidence for a trespass action. Contrast the case at hand with *Berton Kirshner, Inc.*, 209 NLRB 1081 (1974), enfd. 523 F.2d 1046 (9th Cir. 1975), where the Board found the fact that the Respondent promptly called the police and the fact that there were several later handbillings by the union without incident important facts in finding that the respondent had not violated Section 8(a)(1) of the Act.

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[135] In *Titan Wheel Corporation of Illinois*, 333 NLRB 190, fn 1 (2001), the Board did not rule one way or the other on an ALJ's conclusion that there is no authority for the proposition that an employer coerces employees when they see its agents taking photographs only of nonemployees.

Based on the above, it is clear that Respondent's photographing Union solicitors at the Somerville and Brighton Mills locations violated Section 8(a)(1) of the Act.

VIII. Conclusion and Remedy

As is clear from the above, the General Counsel has established, by the preponderance of the evidence, that Respondent violated Section 8(a)(1) of the Act, as alleged. Usually in cases where an employer has unlawfully refused to allow a union access to its facilities, the Board only orders that the employer cease and desist from the unlawful conduct. *Price Chopper*, 325 NLRB 186, 188 (1995). The remedy in this case warrants more. Specifically, the Respondent must be affirmatively required to allow nonemployee representatives of the UFCW and IBEW to solicit employees on their nonworking time, customers, and the public at large, on the walkways, sidewalks, parking lots and other outside areas adjacent to its stores. The Respondent should be required to take this affirmative action for no less than the 60 day notice posting period. The Board ordered a similar affirmative remedy in *Price Chopper*, supra. In *Price Chopper* the Board found that the respondent employer had violated Section 8(a)(1) of the Act by discriminatorily excluding union representatives from soliciting and distributing to off-duty employees on the sidewalks and parking lots adjacent to its stores. In that case the respondent employer had also revised its no solicitation policy to allow no exceptions for any outside groups and there was no allegation that the change was unlawful. In finding that a cease and desist order alone to be insufficient, the Board reasoned that:

> We agree with the General Counsel and the Union that in these circumstances, simply to order the Respondent to cease and desist from discriminatorily denying access to the Union would be a meaningless remedy, because the Respondent could continue to exclude the Union pursuant to its policy of making no exceptions to its no-access policy. The Respondent thus would succeed in foreclosing any meaningful remedy for its unlawful denial of access to the union during a period in which it allowed nonunion groups to solicit on its premises. [footnote omitted] To avoid this anomaly, we shall order the Respondent to afford the Union access to its . . . facilities during the 60-day posting period

325 NLRB at 189.[136]

Although the Respondent here has not yet taken the position that it will make no exceptions, charitable or otherwise, and deny access to the outside areas of its stores to all groups, it is evident that such a result is forthcoming. The Respondent has demonstrated that it is not reluctant to amend its solicitation/distribution rules to suit its purpose of foreclosing all union solicitation/distribution outside of its stores. The Respondent not only amended its solicitation/distribution rules in response to the UFCW's campaign, it did so during the course of this trial as well. With respect to those January 2004 amendments, despite being represented by experienced counsel, the Respondent took a rule that appeared lawful on its face (notwithstanding Nadworny's unlawful interpretation of it), and amended it in an obvious attempt

[136] Compare *Big Y Foods ,Inc.*, 315 NLRB 1083, fn. 3 (1994) where the Board did not follow the administrative law judge's recommended remedial provision requiring the respondent employer to grant the union access to its premises to make up for those times that the union was unlawfully denied access where the employer had not adopted an absolute ban on solicitation by outside groups after it denied access to the union.

to strip away from its employees the right to engage in union solicitation and distribution in the outside areas adjacent to their stores – rights that have long been recognized as being guaranteed by Section 7 of the Act. These actions not only ignore the rule of law, but suggest that nothing will stop this Respondent from trying to keep union solicitation/distribution out, least of all a cease and desist order. To prevent the anomaly that the Board recognized in *Price Chopper* from occurring here, an affirmative order allowing the UFCW and IBEW access is an appropriate and necessary remedy to effectuate the purposes of the Act.

Conclusions of Law

l. Respondent is an employer within the meaning of Section 2(2), (6) and (7) of the Act.

2. United Food and Commercial Workers International Union, its Local 791, and International Brotherhood of Electrical Workers, Local 103 are labor organizations within the meaning of Section 2(5) of the Act.

3. Respondent has violated Section 8(a)(1) of the Act, by:

(a) Discriminatorily prohibiting representatives of the United Food & Commercial Workers International Union, United Food & Commercial Workers Union, Local 791, or the International Brotherhood of Electrical Workers, Local 103, from distributing handbills at any of Respondent's store locations by demanding that they leave, by calling the police to remove them, by issuing trespass notices against them, or in any other way interfering with them.

(b) Maintaining and enforcing solicitation rules that discriminate against labor organizations.

(c) Directing Union solicitors and handbillers to remove themselves from any areas of Respondent's stores where Respondent does not have the right to exclude third parties, threatening to call the police if they do not do so, or calling the police to remove them.

(d) Informing the landlords or entity in control of the outside areas of Respondent's stores where they do not have the right to exclude third parties, about lawful Union solicitation and handbilling where an object of so informing them was to interfere with such activities.

(e) Causing the landlords or entity in control of the outside areas of Respondent's stores to issue letters, trespass notices, agency authorization, or to take any other action, seeking to cause the Union solicitors and handbillers to leave the areas outside of its stores where Respondent does not have the right to exclude them.

(f) Maintaining and enforcing overbroad solicitation/distribution rules that prohibit employees from engaging in solicitation on the sidewalks, walkways, parking lots and other outside areas adjacent to its stores; that prohibit the distribution of literature to other employees and customers during nonwork times in nonwork areas including the outside sidewalks, walkways and parking lots adjacent its stores; and that unduly limits solicitation/distribution to prohibit solicitation/distribution of coworkers who do not wish to be solicited or pursued, who may inconvenienced, who may feel harassed or who otherwise complain about it.

(g) Maintaining or enforcing its solicitation rule to preclude its off-duty employees, who are engaging in union solicitation and/or distribution, from having access to its parking lots and other outside nonwork areas at facilities of Respondent other than the facilities to which they are assigned to work.

(h) Denying its off-duty employees, who are engaging in union solicitation and/or distribution, access to parking lots and other outside nonwork areas on the premises of facilities other than the ones to which the off-duty employees are assigned to work.

(i) Coercively interrogating its employees about their Union activity.

(j) Impliedly threatening its employees with negative consequences if they become involved with the Union.

(k) Surveilling the distribution and solicitation activities of union agents and of employees accepting union literature from them.

4. Respondent's unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

Remedy

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[137]

ORDER

The Respondent, Shaw's Supermarkets, Inc. d/b/a Shaw's Supermarkets and Star Markets, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discriminatorily prohibiting representatives of the United Food & Commercial Workers International Union, United Food & Commercial Workers Union, Local 791, or the International Brotherhood of Electrical Workers, Local 103, from distributing handbills at any of Respondent's store locations by demanding that they leave, by calling the police to remove them, by issuing trespass notices against them, or in any other way interfering with them.

(b) Maintaining and enforcing solicitation rules that discriminate against labor organizations.

(c) Directing Union solicitors and handbillers to remove themselves from any areas of Respondent's stores where Respondent does not have the right to exclude third parties, threatening to call the police if they do not do so, or calling the police to remove them.

[137] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

(d) Informing the landlords or entity in control of the outside areas of Respondent's stores where they do not have the right to exclude third parties, about lawful Union solicitation and handbilling where an object of so informing them was to interfere with such activities.

(e) Causing the landlords or entity in control of the outside areas of Respondent's stores to issue letters, trespass notices, agency authorization, or to take any other action, seeking to cause the Union solicitors and handbillers to leave the areas outside of its stores where Respondent does not have the right to exclude them.

(f) Maintaining and enforcing overbroad solicitation/distribution rules that prohibit employees from engaging in solicitation on the sidewalks, walkways, parking lots and other outside areas adjacent to its stores; that prohibit the distribution of literature to other employees and customers during nonwork times in nonwork areas including the outside sidewalks, walkways and parking lots adjacent its stores; and that unduly limits solicitation/distribution to prohibit solicitation/distribution of coworkers who do not wish to be solicited or pursued, who may inconvenienced, who may feel harassed or who otherwise complain about it.

(g) Maintaining or enforcing its solicitation rule to preclude its off-duty employees, who are engaging in union solicitation and/or distribution, from having access to its parking lots and other outside nonwork areas at facilities of Respondent other than the facilities to which they are assigned to work.

(h) Denying its off-duty employees, who are engaging in union solicitation and/or distribution, access to parking lots and other outside nonwork areas on the premises of facilities other than the ones to which the off-duty employees are assigned to work.

(i) Coercively interrogating its employees about their Union activity.

(j) Impliedly threatening its employees with negative consequences if they become involved with the Union.

(k) Surveilling the distribution and solicitation activities of union agents and of employees accepting union literature from them.

(l) In any like or related manner interfering with, restraining, or coercing employees in the exercise of rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) For a period of at least 60 days beginning with the posting of the Notice to Employees, allow representatives of the UFCW and IBEW to communicate with Respondent's employees during their nonworking time, customers and the public at large on the sidewalks, walkways, parking lots and other outside areas adjacent to their stores.

(b) Within 14 days from the date of this Order, notify all the police departments where Respondent has caused trespass notices to issue against Union solicitors, including the Mansfield, Falmouth and Harwich police departments, that the Board has determined that these trespass notices violated the Act; further, request in writing with a copy to the affected Union solicitors, including Michael Connors, Robert McClay, Donald Berger, Doug Simmons, and Steve Carreira, that the police departments expunge all records of the trespass notices.

(c) Rescind the corporate-wide solicitation rule, and notify its employees, and the Unions in writing that it has done so.

(d) Rescind the amended January 2004 corporate-wide employee solicitation rule and notify the employees, in writing, that it has done so.

(e) Within 14 days after service by the Region, post at all of the stores it operates, [138]copies of the attached notice marked "Appendix."[139] Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since July 30, 2001.

(f) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C., June 27, 2005.

_____
Wallace H. Nations
Administrative Law Judge

[138] A corporate-wide posting is appropriate and necessary here because Respondent's actions were based on discriminatory solicitation/distribution guidelines that are in effect corporate-wide. *Big Y. Foods*, 315 NLRB 1083, fn. 3.

[139] If this Order is enforced by a Judgment of the United States Court of Appeals, the words in the notice reading "POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD" shall read "POSTED PURSUANT TO A JUDGMENT OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER OF THE NATIONAL LABOR RELATIONS BOARD."

APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain with us on your behalf
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT discriminatorily prohibit representatives of the United Food & Commercial Workers International Union, United Food & Commercial Workers Union, Local 791, or the International Brotherhood of Electrical Workers, Local 103, from distributing handbills at any of Respondent's store locations by demanding that they leave, by calling the police to remove them, by issuing trespass notices against them, or in any other way interfering with them.

WE WILL NOT maintain and enforce solicitation rules that discriminate against labor organizations.

WE WILL NOT direct Union solicitors and handbillers to remove themselves from any areas of Respondent's stores where Respondent does not have the right to exclude third parties, threatening to call the police if they do not do so, or calling the police to remove them.

WE WILL NOT inform the landlords or entity in control of the outside areas of Respondent's stores where they do not have the right to exclude third parties, about lawful Union solicitation and handbilling where an object of so informing them was to interfere with such activities.

WE WILL NOT cause the landlords or entity in control of the outside areas of Respondent's stores to issue letters, trespass notices, agency authorization, or to take any other action, seeking to cause the Union solicitors and handbillers to leave the areas outside of its stores where Respondent does not have the right to exclude them.

WE WILL NOT maintain and enforce overbroad solicitation/distribution rules that prohibit employees from engaging in solicitation on the sidewalks, walkways, parking lots and other outside areas adjacent to its stores; that prohibit the distribution of literature to other employees and customers during nonwork times in nonwork areas including the outside sidewalks, walkways and parking lots adjacent its stores; and that unduly limits solicitation/distribution to prohibit solicitation/distribution of coworkers who do not wish to be solicited or pursued, who may inconvenienced, who may feel harassed or who otherwise complain about it.

WE WILL NOT maintain or enforce our solicitation rule to preclude our off-duty employees, who are engaging in union solicitation and/or distribution, from having access to our parking lots and other outside nonwork areas at facilities of Respondent other than the facilities to which they are assigned to work.

WE WILL NOT deny our off-duty employees, who are engaging in union solicitation and/or distribution, access to parking lots and other outside nonwork areas on the premises of facilities other than the ones to which the off-duty employees are assigned to work.

WE WILL NOT coercively interrogate our employees about their Union activity.

WE WILL NOT impliedly threaten our employees with negative consequences if they become involved with the Union.

WE WILL NOT surveil the distribution and solicitation activities of union agents and of employees accepting union literature from them.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of rights guaranteed them by Section 7 of the Act.

WE WILL for a period of at least 60 days beginning with the posting of the Notice to Employees, allow representatives of the UFCW and IBEW to communicate with Respondent's employees during their nonworking time, customers and the public at large on the sidewalks, walkways, parking lots and other outside areas adjacent to their stores.

WE WILL within 14 days from the date of this Order, notify all the police departments where Respondent has caused trespass notices to issue against Union solicitors, including the Mansfield, Falmouth and Harwich police departments, that the Board has determined that these trespass notices violated the Act; further, request in writing with a copy to the affected Union solicitors, including Michael Connors, Robert McClay, Donald Berger, Doug Simmons, and Steve Carreira, that the police departments expunge all records of the trespass notices.

WE WILL rescind the corporate-wide solicitation rule, and notify our employees, and the Unions in writing that we have done so.

WE WILL rescind the amended January 2004 corporate-wide employee solicitation rule and notify the employees, in writing, that we have done so.

SHAW'S SUPERMARKETS, INC.

(Employer)

Dated _____ By _____

(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlrb.gov.

10 Causeway Street, Boston Federal Building, 6th Floor, Room 601

Boston, Massachusetts 02222–1072

Hours of Operation: 8:30 a.m. to 5 p.m.

617-565-6700.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 CONSECUTIVE DAYS FROM THE DATE OF POSTING AND MUST NOT BE ALTERED, DEFACED, OR COVERED BY ANY OTHER MATERIAL. ANY QUESTIONS CONCERNING THIS NOTICE OR COMPLIANCE WITH ITS PROVISIONS MAY BE DIRECTED TO THE ABOVE REGIONAL OFFICE'S COMPLIANCE OFFICER, 617-565-6701.